Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DOMINIC F. GANGALE,
DALE M. GANGALE,

Petitioners,

v.

PENSON FINANCIAL SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court below has *entered both* a decision in direct conflict with the United States Supreme Court's cornerstone decision of *Gallagher v. Jones*, 9 S. Ct. 335, 337 (1889) *and* decided important questions of federal law in conflict with this Court's and other courts of appeals.

One Hundred Twelve years have passed since this Court ruled on the landmark *Gallagher v. Jones*. Since that time there has been no guidance nor expansion of circumstances influencing the *Gallagher* decision.

1. Whether the United States stands ready to embrace a Doctrine whereby contractual agreements with securities firms can be violated by the securities brokers without consequences?

2. Whether in its *de novo* review, the court of appeals erred in determining that where a securities broker ***violates a contract*** by liquidating securities positions, the measure of damages ***adopted by*** the Supreme Court and the courts of Texas under the *Gallagher v. Jones*, 9 S. Ct. 335, 337 (1889) decision are applicable?

3. Whether the court of appeals erred in determining that: "EFGI was liable to PFS for losses in the Gangales' account and had a contractual right under the Gangales' account agreement to terminate the account"?

QUESTIONS PRESENTED – Continued

4. Whether this court can allow the continuation of astronomical errors of law by our Federal Judiciary with respect to securities, simply due to the absence of modern day Judicial distinction between a wrongful liquidation and Contract cases?

5. Whether a *Condition,* which is at the very core of an issue or theory preserved in lower Court is barred from appellate review in light of this Court's opinion in *Commonwealth Coatings Co. v. Continental Casualty Co.,* 393 U.S. 145 (1968)?

6. Whether a contractual agreement with specified conditions to maintain certain stock positions runs contrary to a well-defined and dominant public policy when contrary to the agreement the positions are liquidated?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Dominic F. Gangale and Dale M. Gangale, pray that a writ of certiorari issue to review the Ruling and Opinion of the Courts below, denying relief from arbitration award, that if applicable, threatens the United States entire Principles of Contract Law.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing is found in the Appendix at p. 12. The decision of the United States Court of Appeals for the Eleventh Circuit is found in the Appendix at p. 1-8. The decision of the United States District Court for the Middle District of Florida is found in the Appendix at p. 9-11.

JURISDICTION

The decision of the Court of Appeals was issued on May 03, 2001.

A timely Petition for Rehearing was denied on June 12, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title 9 of U.S.C. Sections 10 which provides:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either or them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

This case also involves **Rule 405** of the NYSE is commonly referred to as the (Know Your Customer Rule), it provides in part:

"Every member organization is required . . . to:

(1) Use due diligence to learn the essential facts relative to *every customer, every order, every cash or margin account accepted or carried by such organization* and every person holding power of attorney over any account accepted or carried by such organization." (Emphasis added)

This case also involves **Rule 2110** of NASD Manual (Standards of Commercial Honor and Principles of Trade):

"A member in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

This case also involves **Rule 240.10b-5** of the Securities & Exchange Commission, promulgated under the general

anti-fraud provisions of the Securities Exchange Act of 1934, which provides:

> "It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device scheme or artifice to defraud;
>
> (2) to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or
>
> (3) to engage in any act, practice, or course of business which would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

This case also involves the **Securities & Exchange Act of 1934**, Section 20(a), it provides:

> "(a) Every person who, directly or indirectly, controls any person liable under any provisions of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

This case also involves **Rule 2310-2** of NASD Manual, (Fair Dealing with Customers.), provides:

"The Commission has also recognized that brokers and dealers have an obligation of fair dealing . . . The Commission bases this obligation of the principle that when a securities dealer opens his business he is, in effect, representing that he will deal fairly with the public."

STATEMENT OF THE CASE

In February of 1997, Gangale transferred into the Penson Account approximately $1,300,000 with the account having a Net Equity on February 28, 1997 of $1,314,291. By April 30, 1997 the Net Equity had fallen to $72,580. By August 31, 1997 the unrealized loss disappeared and the account once again stood at $1,305,780.

Penson under oath admitted their computer system was unable to calculate margin requirements on the highly complex Gangale account, thus failing to apply the proper regulatory compliance requirements, thus causing the account to experience wide fluctuations in value.

On or about December 22, 1997 management of Penson, realizing that the Gangale account has a deficit Net Equity of $400,000 was faced with what they determined to be two possibilities; as was testimony of Penson's Philip Pendergraff:

"There was really a couple of issues. One, Empire indicated that if we – if the account was sold out and there was a 400,000 debit balance, that that would potentially cause them to close.

And secondly, it was our perspective under this agreement, even though we couldn't establish a value for the note, that we weren't any worse off with the additional collateral that Mr. Gangale was offering

and as long as the account didn't deteriorate any further, that we were willing to give he and Empire time to work this situation out." (Exhibit "C" Bk II Pg 132 Ln 3) (Emphasis added)

In discussing the proposed agreement Penson and Empire in concert, co-authored and emphasized: *"Whatever form of writing you put it in, certainly make it ambiguous enough."* with Penson replying: *"it will be."* (Tps. P 16 L 16)

Thus, consistent with prior behavior and from the outset of the new agreement, Penson and Empire continued to act against the doctrine of fair dealing, act in bad faith and act outside the spirit of the law.

A Memorandum of Agreement was drafted by Penson and Empire. Gangale, noting that the agreement – as drafted – was not reflective of the terms discussed, made changes. Penson and Empire accepted the revisions. Gangale assigned the original One Million Dollar notes to Penson, with Empire notarizing the assignment of the Notes.

Commencing on or about February 18, 1998, with the Gangale account now standing at plus $380,000 in equity, exclusive of the Gangale notes, with the account now having Five Hundred Eighty Two (582) *less* Option Contracts which expired in January, Penson issues a ***bogus*** maintenance call and liquidation begin.[1]

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[1] First, Penson had agreed to carry the positions that were on the account as of Dec. 29, 1977. Second, there was no new Fed call. The account stood at a plus $380,000 Thousand from a negative $400,000. Plus, the January Options consisting of 582 contracts expired, thus not needing the capital requirements previously needed. Again, a clear violation of Securities Laws.

Empire's justification for issuing the maintenance call: *"The reason why I called is Penson had received the correspondence back from Guttisgerg Cheese. I'm sure I didn't pronounce that correctly. And in it, there was no financials. And due to the inability of them to get financials to substantiate the validity of the note or the strength of the note, they've elected to issue a maintenance call for $250,000 payable immediately."* (Exhibit "G" Pg 8)[2]

However, the testimony of Penson's Philip Pendergraff revealed the true reason for the ***bogus*** maintenance call.

"Well, sometime in late February, Mr. Gagne (Empire) *called and asked that Penson take the account directly on its books and that Empire be removed as introducing broker on the account."* (Transcript "C" Bk II Pg 96 Ln 11)

It is important to note that the taped conversation in question was never made available to Gangale. Additionally, the vast majority of the taped conversations were admittedly destroyed. The selected few that were supplied, ***ranged*** in a wide time-table sequence, indicating deliberate destruction of the taped recordings, which would have been extremely damaging to Penson. (Exhibit C-15)

Kevin Gagne under oath, admitted knowing nothing about options. Yet he was the individual chosen to close the large Option positions in the account. Admitting he was closing everything at whatever the market-makers would *Bid* or *Ask*. In a matter of days the Gangale account

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[2] The record however, is clear that prior to the assignment, Gangale informed both Penson and Empire a *Thousand* times that Guggisburg was a private company and was under no obligation to provide financial statements.

went from a plus $380,000, Thousand in equity, to a negative $13,400.

After liquidation, the five day window of damages, according to Penson, produced damages to Gangale of $26,924.88. Penson's admitted damages further bolster the validity of the Gangale account damages. The Gangale account and positions were discussed in great length, and therefore damages could be easily determined: If there was any evidence contrary to the Gangale damage model, Penson could have easily pointed to the taped conversations that would disclose the conflict, for the laid out plan and strategy was discussed almost daily:

> Kevin: *"That's what I wanted to kind of discuss so I know, instead of waiting for the zero hour come March, cause that's when you have other things coming forward again for expiration. Just kind of get an idea what your strategy is of that. So, instead of trying to run it by everybody at the last hour, we know ahead of time what you want to do."* (Tapes Pg. 91 Ln. 24)

When instructed to at least return one of the Guggisburg notes, it was Penson's initial position that: *"If you want the note back, I can have the note back."* (Tapes Pg. 215, Ln. 21).

That position changed and on March 11, 1998 Penson sought instead to have a general release executed: *"This exchange will be accompanied by the execution of a mutual release by Penson, Empire Financial Services and you."*. (Exhibit C-13)

On March 16, 1998, Counsel for Gangale informed Penson to release one of the notes. (Exhibit C-14)

On Sept. 10, 1998, Counsel for Gangale again informed Penson that funds were held "in trust" and would disburse upon receipt of the notes. (Exhibit C-16)

Constant demands from Gangale and Counsel for Gangale ranging from requesting a payoff amount to having funds in escrow to have the notes returned were ignored. (Exhibit C-17)

Only after a criminal complaint was filed, alleging RICO misconduct, did Penson immediately return the notes on October 7, 1998. (Exhibit C-18)

On April 10, 1998 the Gangales filed a Claim against Penson Financial Services Inc. Containing therein: Count I *Fraudulent Inducement*, Count II, *Breach of Fiduciary Duty*, Count III, *Negligence*, and Count IV, *Breach of Contract*. (Emphasis added)

At the commencement of the hearings, held in Tampa Bay, Florida, Penson's Vice President Mr. Phil Pendergraff stipulated to the validity of the Memorandum of Agreement, and further testified:

> *"No, we agreed under the terms of this agreement not to liquidate based on certain criteria, to forego some of our existing rights."* (Exhibit "C" Bk II Pg 126 Ln 3)

"It did not go below the $400,000 negative; that's correct." (Exhibit "C" Bk II Pg 142 Ln 8)

Penson's Mr. Pendergraff testified that Penson's computer system was not capable of determining the correct maintenance requirements in the complex Gangale account. (Exhibit "C" Bk II Pg 191 Ln 12)

It was Penson's further testimony: *"For the purposes of the customer protection rule, it means that those balances*

(account) *and the underlying customer securities are the safekeeping responsibilities of the Clearing broker. You can't give them to the introducing broker. And for purposes of fraud, those securities are under our fidelity bond. So we are the safekeeping agent that acts on behalf of the introducing broker and its customers."* (Transcript "C" Bk II Pg 10)

Liability in the Gangale case was so obvious that the arbitration panel needed no deliberation. As illustrated by Mr. Adler's comments in his last few sentences: *"I've got to tell these guys what I think the applicable law is and it would be better if Mr. Simmons was permitted to do that."* (Transcript "C" Bk III Pg 164 Ln 20)

As the responsible party to safeguard the Gangale account, Penson was correctly found liable. However, Two of the arbitrators were instructed by the third member to use a theory of law that had nothing to do with the Gangale case. That theory being Penson's understanding of the *Gallagher v. Jones,* method of damage calculations. Thus, giving Gangale a hollow victory with an award of $26,924.88, when in fact he suffered damages in excess of 1.6 million as a result of Penson's broken promises and other unconscionable acts.

On October 5, 2000 the United States District Court disposed the case by merely rubber-stamping and confirming the arbitration award with one sentence.

Gangale Appealed to the Eleventh Circuit Court of Appeals on November 2, 2000.

The case and any notion of Gangale's non-compliance can be laid to rest and summarized in two small sentences:

> Dominic: *"Have I told you anything that I haven't done?"*

Kevin: *"No you have not. No you have not."* (Exhibit "G" Pg. 20)

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES CAN NOT EMBRACE A DOCTRINE OF LAW WHEREBY CONTRACTUAL AGREEMENTS WITH SECURITIES FIRMS CAN BE VIOLATED WITHOUT CONSEQUENCES.

To maintain that the securities industry can violate a contract and are immune from laws of our nation is simply ludicrous.[3]

The captioned case involves a stipulated valid agreement specifically forged as a remedy in resolving specific problems between a Securities Broker (Penson) and Customer, (Gangale) whereby Gangale assigned One Million Dollars (Two Notes) to Penson in exchange for the assurance no liquidation would take place in the Gangale account, except under certain conditions as provided for under the agreement.

Today the securities industry in some fashion touches the lives of every individual in the U.S. The Appeals Court's lack of understanding in these increasingly complicated securities matters illustrates the need for this Court to provide Judicial illumination in addressing modern day, contemporary issues.

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[3] To buy into Penson's Wrongful Liquidation theory would require us to also buy into the theory that no parties could safely agree to certain promises and conditions governing securities.

II.

THE ELEVENTH CIRCUIT'S RULING IS IN DIRECT CONFLICT WITH THIS COURT'S MANDATE IN *GALLAGHER V. JONES*, 9 S. Ct. 335, 337 (1889), THAT EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED.

Again, Under a standard Customer Agreement, a brokerage house typically reserves the right to accept/reject/liquidate, etc . . . thus, they have a *Contractual Right* to liquidate. Liquidation however, is not unbridled and must occur within the parameters of reasonableness and prudence under the circumstances known. If liquidation occurs outside those parameters, you have a wrongful liquidation case.

Damages under *Gallagher v. Jones* and *Reed v. White* are applicable in wrongful liquidation cases.

However, the Gangale case is a Contract case: actioned as such; argued as such; stipulated by the parties as such; and grasped by the arbitrators as such.

The District Court, in One sentence, disposed the Gangale case by merely *rubber-stamping* the arbitration award.

In reviewing *de novo*, the Appeals Court, in deciding to deny the requested relief, misstated both the record and the law and further missed *Gallagher's* entire thrust: opining:

> "Gangales' offer no reason to believe that the arbitration panel's decision to apply the measure of damages ***adopted by*** the Supreme Court and the courts of Texas for cases where a ***broker violates a contract*** by liquidating securities

> positions was anything more than a misinterpretation or misapplication of the law." (App. 7) (Emphasis added)

Contrary to the Eleventh Circuit's opinion, the U.S. Supreme Court and other courts have ***never adopted*** the premise that: "for cases where a broker violates a contract by liquidating securities positions", the measure of damages as outlined in *Gallagher v. Jones,* are the appropriate measure".

In fact, this court in *Gallagher,* indirectly addressed the very pivotal issue distinguishing it from the Gangale case by stating: "Was the plaintiff under obligation to sell the stock and invest the proceeds of such sale as directed by the defendant? . . . ***I do not find, in the examination of the record and testimony, any contract or understanding between the parties*** requiring the plaintiff to do it." (Emphasis added) There was clearly such a contract governing Penson in its handling of the Gangale securities. Thus *Gallagher* is a wrongful liquidation case, not a Contract case.

Additionally, high courts have offered continuous cautionary measures on the importance of *circumstances* when addressing wrongful liquidation cases.

Penson's own citation of *Reed v. White,* 571 S.W.2d 395 (Tex. Civ. App. 1978) which is *yet another plain vanilla* wrongful liquidation case, cautions:

> *"In the absence of special circumstances which might dictate otherwise, . . . and where there was no pleading for special damages of any kind . . . plaintiffs received all damages legally recoverable by cause of action they pleaded."*

In *Cauble v. Mabon Nuget & Co.*, 595 F. Supp. 985 (S.D.N.Y. 1984) the Court addressed the basic boilerplate agreements by stating:

> *"Moreover, where a customer agreement is in effect, the broker does not have unbridled discretion to liquidate an account; its power to liquidate must be exercised in good faith under the existing facts and circumstances,"*

And in *Lichter v. Dean Witter Reynolds Inc.*, 570 F. Supp. 533, 536 (N.D. Ill. 1983), we find:

> *"It is not as though Pain Webber had converted an irreplaceable Van Gogh."*[4]

Gallagher in attempting to repair the injured party, further emphasizes:

> "The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price."
>
> "Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion . . . But the application of this rule to stocks would, as before said, be very inadequate and unjust."

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[4] Penson having been so negligent Pre-Agreement in mishandling the Gangale account by their inability to correctly calculate the margin requirements, granted concessions when negotiating the agreement that would otherwise not be granted to anyone. Thus, the Gangale contract took the form of a Van Gogh that could not be duplicated anywhere.

If the above holds true for stocks, then Options, spanning a precise limited life – such as those in the Gangale Account – have no opportunity for fruition when they are prematurely killed.

No plausible argument of misinterpretation or misapplication of law can be made when the arbitrators ***grasped the obvious*** and unique difference between the Gangale case and a garden variety wrongful liquidation case. Reflected on record are the comments made during an execute session: *"I think this is one case in Zillion where they . . . where it worked out this way, where the guy responsible, the clearing broker, entered into the agreement; isn't that stupid?"* with fellow arbitrator agreeing: *"Really"* (Transcript book I page 25 Line 13).[5]

And the most telling of all: the following immediate confession by the arbitrator: **"And then – and then – that's what fucked us up."** (Tr. bk I page 25 Line 21) Which immediately begs the question; why could an agreement mess the arbitrators up?

Additionally, it is simply not credible to argue misinterpretation when there is nothing to interpret. Just as there can be no misapplication when in fact, six (6) days are spent outlining contractual broken promises. What you have instead, is simply a miscarriage of justice.

To misinterpret or misapply would require the threshold requirement of **lack of knowledge. Did the arbitrators have knowledge that the Gangale case was a Contract case?** That Evidence is found in literally every

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[5] Above conversation became part of the record when during an executive session, the tape recording was inadvertently left recording.

page of the record. Since the arbitrators did indeed have knowledge, they manifestly disregarded applicable law.

"Should an arbitrator be guilty of manifestly disregarding the law, then reversal of the arbitrator's decision is appropriate."

In *Carte Blanche (Singapore) Pte, Ltd. v. Carte Blanche International, Ltd.*, 888 F.2d 260 (C.A. 2nd 1989) the court explains:

> *"Manifest disregard of the law" by arbitrators is judicially created ground for vacating arbitration award, and refers to error which was obvious and capable of being readily and instantly perceived by average person qualified to serve as arbitrator; doctrine implies that arbitrator appreciates existence of clearly governing legal principle but decides to ignore or pay no attention to it."*

In *Wilko v. Swan*, 74 S. Ct. 182 (1853) Justice Frankfurter, dissenting states:

> "Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, 'bound to decide in accordance with provisions of section 12(2).' On this we are all agreed. It is suggested. however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law 'would constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,' appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, *whereby such compliance will appear, or want of it will upset the award*". (Emphasis added)

At the end of those six days, Arbitrator Adler chose to disregard a well defined principle of law, and award

damages on a matter that was not submitted to the panel. The Gangale Claim was a *Breach of Contract Claim,* not a wrongful liquidation claim. Two of the Three arbitrators – who were not schooled is the field of law – were instructed to apply a theory of law – resulting in an award which is inadequate and unjust.[6]

The evidence is clear that the arbitrators recognized the unique nature of the case, (*"one case in a zillion"*). They did, in fact, recognize that this was a contract case. (*"entered into an agreement"*). And they further recognized that the Gangale *'Contract'* is what "fu___ ___ed us up", which clearly indicates *intentional wrongdoing,* by ignoring the applicable standard for damages resulting from Penson's failure to keep their promises.

III.

CAN THIS COURT ALLOW THE CONTINUATION OF ASTRONOMICAL ERRORS OF LAW BY OUR FEDERAL JUDICIARY WITH RESPECT TO SECURITIES, SIMPLY DUE TO THE ABSENCE OF MODERN DAY JUDICIAL DISTINCTION BETWEEN WRONGFUL LIQUIDATION AND CONTRACT CASES.

The Supreme Court gave arbitrators explicit warning:

> *Eastern Associated Coal Corp. v. United Mine Workers of America,* 121 S. Ct. 462 (2000) "Labor arbitrator's award must draw its essence from

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[6] *"Based on my understanding of the United States Supreme Court's directions for the calculation of damages for a wrongful liquidation, . . . If there should be a determination that the liquidation of all these positions was wrongful and that Penson is responsible . . . The Supreme Court guidelines would total $26,924.88."* (Exhibit "E")

> the contract and cannot simply reflect arbitrator's own notions of industrial justice."

In *W.R. Grace and Co. v. Local Union, United Rubber, Workers*, 103 S. Ct. 2177 (1983), this Court carefully articulated: "Unless arbitral decision does not draw its essence from the collective bargaining agreement, court is bound to enforce the award and is not entitled to review the merits of the contract dispute." The Court further expressed public policy concerns: "If contract as interpreted by arbitrator violates some explicit public policy, court may not enforce the contract".

Here, it is undisputed as to the meaning and intentions of the contract. The testimony is clear, so clear in fact, that Penson attempted to: **"whatever form of writing you put it in, certainly make it ambiguous enough."**

IV.

ANY POTENTIAL LIABILILTY OR CLAIM PENSON MAY HAVE AGAINST EMPIRE MUST BE RULED UPON ON THE MERITS AND CANNOT BE ADJUDICATED BY THE ELEVENTH CIRCUIT. EMPIRE DID NOT HAVE A CONTRACTUAL RIGHT TO LIQUIDATE THE ACCOUNT.

Whether or not Empire is liable for any Penson Claims was not before the Eleventh Circuit, and liability should not have been concluded. Here again, the Eleventh Circuit, lacking understanding of securities law, erred.

By addressing specific issues and establishing a direct contractual relationship with Penson, the new Memorandum of Agreement controls over the basis customer agreement. And any arguments of EFGI rights to liquidate should be immediately dismissed.

To begin, EFGI had a clear understanding of the new terms and conditions. The new agreement itself served as notice to Penson and EFGI that the old rules had changed.

Further, EFGI never had any contractual authority with respect to **option contracts**, except: *"EFGI and/or you, in your respective sole discretion, may refuse any order to sell such underlying securities received from the undersigned."* (App. 59)

Penson, aware of the inherent volatility associated with options, reserved for themselves the entire scope of authority. That reservation is clearly spelled out under the ***Option Account Agreement and Terms***, limiting ***"Authority, Execution of Orders, Security Interest"*** solely to Penson. (App. 57)

Penson's own Philip Pendergraff testified that; Penson governed under Federal Rules and Regulations was the statutory **responsible party to safeguard** the Gangale account.[7]

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[7] *"For the purposes of the customer protection rule, it means that those balances* (account) *and the underlying customer securities are the safekeeping responsibilities of the Clearing broker. You can't give them to the introducing broker. And for purposes of fraud, those securities are under our fidelity bond. So we are the safekeeping agent that acts on behalf of the introducing broker and its customers."* (Transcript "C" Bk II Pg 10)

Rule 2520 of the NASD Manual defines the term "Customer" as follows: *"The term "customer" means any person for whom securities are purchased or sold or to whom securities are purchased or sold . . . It will also include any person for whom securities are held or carried and to or for whom a member organization extends, arranges or maintains any credit."*

The very first paragraph of the Memorandum Of Agreement states:

> "Whereas Dominic F. Gangale (Gangale) is a customer of Penson Financial Services, Inc."

Thus, Gangale is Penson's customer by; (1) Memorandum Of Agreement, (2) Penson's own testimony, and (3) under Federal Statue.

Penson, Penson, Penson, is the *Member Organization*. Penson is responsible. Penson has the *Sole Authority* to modify the boiler plate agreement. Nothing, absolutely nothing happens without Penson's consent and approval.

Penson, in accordance with Section 20(a) of the **Securities & Exchange Act of 1934**, is the Controlling person. [a] Penson Controlled the *Securities*. [b] Penson Controlled the *Funds*. [c] The *Gangale Notes* were assigned and controlled by Penson. [d] Penson Controlled the *Trading System*. [e] Penson Controlled the *Accounting System*. (g) Penson is the statutory *Responsible Party*. (h) Penson Controlled Empire. (i) Penson has the sole authority to modify agreements. (j) Empire had absolutely no power or authority over Penson.

To further illustrate who controls, the record below indicates that upon the commencement of this case, Penson withheld all funds due Empire from commissions, and still withholds said funds.

It therefore seems that Penson is fully capable of safeguarding their own interests but not those of Gangale. Yet the best example of Control is found in Penson's own words:

> *"And secondly, it was our perspective under this agreement, even though we couldn't establish a value for the note, that we weren't any worse off with the*

additional collateral that Mr. Gangale was offering and as long as the account didn't deteriorate any further, that we were willing to give he and Empire time to work this situation out." (Exhibit "C" Bk II Pg 132 Ln 3) (Emphasis added)

In general principles governing contract law, we find the following: **[a]** "Any doubtful or ambiguous language in a contract must be interpreted most strongly against the party who drew the contract." **[b]** "Special provisions will govern in its construction over matters stated in general terms." **[c]** "When a contract is partly printed and partly typewritten or written, the typewriting or writing controls over any inconsistent printed parts." (App. 55)

Furthermore, (a) EFGI not only had knowledge, (b) EFGI co-authored the agreement. (c) EFGI agreed with the terms of the Agreement (d) The Memorandum of Agreement served as notice that the old terms and conditions had changed. (e) EFGI had no authority to liquidate whether under the old ***Option Account Terms*** or the ***new Memorandum of Agreement.*** (f) finally, EFGI was the reason and direct beneficiary of the Penson-Gangale agreement. (App. 21)

Additionally, paramount to the interpretation of any contract is the intent of the parties. Here, the testimony of *Intent* is not only crystal clear – with there being no disagreement – the parties testimony confirms their intent. Thus, the **'meeting of the minds'** is undisputed. (App. 22-23)

The few selected taped conversations which were provided (with the balance allegedly destroyed) make it abundantly clear that Gangale, having no further faith in Empire's oral promises, demanded that Penson, the controlling party and ultimate authority, execute the Agreement.

Even if somehow it was concluded that Gangale had no rights under the Agreement, the agreement should have been invalidated and the parties returned to their original pre-agreement position. Which means that at a minimum, Gangale would have been entitled to the $304,000 he added to the account a few days after the signing of the agreement, and further be entitled to any claims he might have against Penson and Empire.

The Eleventh Circuit contention that Empire had a right to liquidate is therefore fatally flawed.

V.

THE ELEVENTH DISTRICT COURT ERRONEOUSLY APPLIED A PROCEDURAL BAR TO A CLAIM AND EVIDENCE WHEN PETITIONER ASSERTED AND PRESERVED THE PARTIALITY CLAIM AT THE LOWER COURT, WHICH IS IN DIRECT CONFLICT WITH THIS COURTS DECISION IN *COMMONWEALTH COATINGS CO. V. CONTINENTAL CASUALTY CO.*, 393 U.S. 145 (1968).

The courts role in reviewing claims under the Federal Arbitration Act ("FAA"). Sections 1-16 of Title 9 of the United States Code, is a narrow one. Vacating an arbitration award however, is warranted upon the following:

> (1) *Where the award was procured by corruption, fraud, or undue means.*
>
> (2) *Where there was evident partiality* or corruption in the arbitrators, or either or them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which

> the rights of any party have been prejudiced. (emphasis added)
>
> (4) *Where the arbitrators exceeded their powers*, . . . (Emphasis added)

In reviewing the issue of Partiality, the Eleventh Circuit Court points to Two additional evidence issues which *were not* considered due to the Court's contention that they were not raised in the district court. (App. 2-3)

> 1) That the withdrawal of the memorandum was conditional to a stipulated agreement.
>
> 2) That arbitrators actions failed the Rationality test.

As to number one, there can be no disagreement that the withdrawal of the memorandum was raised as a partiality ***issue*** at the lower Court. Therefore, that issue or theory is not new and will be further addressed.

Number Two, rationality like reasonableness, fairness, and unconscionableness are, or should be, unconscious participants to any decision. Thus, any decision lacking the presence of those intangibles will illustrate an issue of *Partiality*, which was preserved in lower court.

Pointing to various points on record to demonstrate specific bias is not a waiver of rights once the partiality issue has been preserved.

In *Saxis Steamship C. v. Multifacs International*, 375 F.2d 577 (C.A. N.Y. 1967) the courts are reminded of their duty: "When a claim of partiality as to arbitration award is made, court is under an obligation to scan record to see if it demonstrates evident partiality on part of arbitrators."

When considering the ***condition*** under which the withdrawal was made, the alleged new issue, is based

upon, and grows out of the ***old preserved issue.*** Additionally, the Condition is *linked so intricately,* it cannot be unlinked. The Condition of the withdrawal, was in fact, part of the very sentence in which the withdrawal was announced. (App. 36)

Here again Adler demonstrated clear direct partiality in immediately violating the agreed upon terms: (Exhibit "C" Bk III Pg 107 Ln 23)

> Snyderburn: ***"the memo comes out, the cases stay in, and I want Mr Simmons to agree that he won't have to – you don't have to – don't have to submit any other cases. Agreeable?"***
>
> Mr. Simmons: ***"That is agreeable with us"*** (Exhibit "C" Bk III Pg 107 Ln 23)
>
> Arbitrator Adler: ***"You don't want to reply to this?"***
>
> Mr. Simmons: ***"If the memo comes out, we do not need to reply."***
>
> Arbitrator Adler: ***"You're not going to furnish any citations?"***
>
> Mr. Simmons: ***"None other than the ones we've already furnished."***
>
> Arbitrator Adler: ***"All right. Fine. Okay . . . "***

Moments later, Arbitrator Adler is actively seeking submissions from Penson, violating what was just agreed, and the terms of the withdrawal. Clearly demonstrating further Partiality. (App. 36-37)

> Mr. Simmons: *"If I could be permitted, I'd like to return to my hotel room and leave with the panel a controlling Texas case that . . . "*
>
> Arbitrator Adler: *"I would welcome it. As a matter of fact, while you were saying what you did say, I*

said, oh, boy, I've got to tell these guys what I think the applicable law is and it would be better if Mr. Simmons was permitted to do that."

This Court in addressing the Partiality issue in *Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145 (1968) stated: "any tribunal permitted by law to try cases and controversies not only must be unbiased but *must also avoid even appearance of bias.*" Comparing s18 of the Rules of the American Arbitration Association to the standards of the 33d Canon of Judicial Ethics, the Court further stated: "we should, if anything be more scrupulous to safeguard the impartiality of **arbitrators** than judges, since the former have completely free rein to decide the law as well as the facts." (Emphasis added)

Thus, Petitioners have clearly demonstrated the arbitrator exceeded his scope of authority on a number of occasions with direct, definite, and clear demonstration. (1) The Gangale Memorandum signed and adopted by counsel, was **Ruled upon** by the ***panel to be accepted.*** Arbitrator Adler clearly exceeded his authority by not adhering to that ruling. (2) Adler should ***not*** have embarked on a crusade against non-attorneys with the memorandum being signed and adopted by counsel. (App. 35) And (3) Adler violated the terms which were conditional to the withdrawal of the memorandum. (App. 36)

In *Roche v. Local 32B-32J*, 755 F. Supp. 622 (S.D.N.Y. 1991), we find: "To vacate arbitration award on ground of arbitrator misconduct, misconduct must amount to denial of fundamental fairness of arbitration proceeding."

In *Reichman v. Creative Real Estate*, 476 F. Supp. 1276 (S.D.N.Y. 1979) "Touchstone in considering claims of arbitrator misconduct is 'Fairness' ":

To the argument of the withdrawal being voluntary, Gangale has always maintained that eventually and reluctantly, he did withdraw it. However, In so reviewing this *voluntariness*, which needs an independent Federal consideration, the Court's duty of inquiry is one of ***reasonableness under the circumstances.***

Considering the amount of time that would be required for a non-Attorney to prepare such a document, would such a document be prepared to serve no purpose? After carefully documenting Penson's unconscionable acts why would Gangale withdraw the document?

Considering the overwhelming superior position of Chairman Adler, were Gangale's rights not significantly impaired when Adler went against the panel's ruling and commenced a continuous argument against the acceptance of the memorandum? Adler's protests and displeasure required two session breaks. Much of the displeasure and pressure to withdraw was off the record. Most importantly, the record indicates the discussions were becoming increasingly hostile.

Gangale, contrary to his desire, and based on the circumstances, concluded that: it may be better to *involuntarily* volunteer to withdraw his memorandum. Would any reasonable person, standing in Gangale's shoes, have done anything different?

It remains however that the Panel had ***Ruled To Accept the Memorandum***. Adler simply ***exceeded his Authority*** and acted ***outside his defined jurisdiction.***

There can be no plausible argument of impartiality when in fact the sole reason for the non-acceptance of the Gangale memorandum was due to the memorandum being "written by someone other than yourself". (App.

34-36) And no reasonable mind can come to the conclusion that the withdrawal of the memorandum was truly voluntary. Just as no reasonable mind can conclude that in the final minutes, Adler's animosity did not spill over into the Award.

In *Totem Marine Tug & Barg v. North American Towing*, 607 F.2d 649 (C.A. 5th 1979) "All Parties in an arbitration proceeding are entitled to notice and an opportunity to be heard."

The fact that the Memorandum was not accepted for no just reason demonstrates **evident partiality** in itself, for who had a greater right to be heard than Gangale?

VI.

THE ELEVENTH CIRCUIT'S RULING THAT A CONTRACTUAL AGREEMENT WITH SPECIFIED CONDITIONS TO MAINTAIN CERTAIN STOCK POSITIONS CAN BE VIOLATED WITHOUT CONTRACT LAW CONSEQUENCES, RUNS CONTRARY TO AN EXPLICIT, WELL-DEFINED AND DOMINANT PUBLIC POLICY.

The Eleventh Circuit's Ruling runs contrary to Public policy, contrary to *Gallagher v. Jones*, and puts at ***Public risk*** this nation's entire Principles of Contract Law.

It is universal Judicial knowledge that the prevailing rule is; 'one who executes a written contract is bound by its terms'.

In *Supak & Sons Manufacturing v. Pervel Ind.*, 593 F.2d 135 (C.A. 4th N.C. 1979) we are reminded that contracts with securities brokers have: *"same footing as other Contracts – no more – no less."*

Section 462 of Am. Jur., *Defining* ***Arbitrator's*** *Power*, states; "However, in making his decision, the arbitrator

must follow Federal law, which governs all questions regarding the interpretation, validity, and enforceability of an arbitration agreement".

Section 3444, AM. JUR., *Requirement that Arbitrator Draw the Award from the Essence of the Contract*, cites a number of cases.

This Court has made it clear that arbitrators have a defined role. In *United Steelworkers of America v. Enterprise Wheel & Car*, 363 S. Ct. 593 (1960) it ruled: "Although arbitrators have no obligation to give their reasons for an award, an arbitration award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrators words manifest an infidelity to this obligation, Courts have no choice but to refuse enforcement of the award."

In *Eastern Associated Coal Corp. v. United Mine Workers of America*, 121 S. Ct. 462 (2000) it stated: "Labor arbitrator's award must draw its essence from the contract and cannot simply reflect arbitrator's own notions of industrial justice".

In *United Steelworkers of America v. Enterprise Wheel & Car*, "Arbitrators are commissioned to bring their informed judgment to bear in order to reach a fair solution . . . " However, in the Gangale case, not only did the arbitrators *not bring their informed judgment*, but two of the arbitrators not having any confidence in their informed judgment nor knowledge of law, simply ruled as they were instructed.

In *Burke Distributing Corp. v. International Brotherhood of Teamsters*, 106 CCH LC 12357 (1986 D.C. Mass.), the issue of basic incompetence is recognized. " . . . an award is enforceable where it is not unfounded in reason and fact, based on reasoning so palpable faulty that no judge,

or group of judges, could conceivably have made such a ruling, or mistakenly based on a crucial assumption that was concededly a nonfact".

During trial, it was made clear to the arbitrators that Penson would not and could not cite any law or authority to support their contention that the Gangale case was a wrongful liquidation case. (Tr."C" Bk I Pg.14 Ln18) The arbitrators also knew that the Gangale Breach of Contract Claim, involved a **"question of law"** for proper resolution. Yet they chose to ignore the law and instead apply arbitrators Adler's particular brand of industrial justice.

The essence of the Gangale case as stated in: *Mercantile Holdings, Inc. v. Charles Keeshin,* 261 Ill. App. 3d 546 (1993) is "the gist of this case is not a wrongful sale of the stock . . . but rather the gist of this case is a wrongful breach of the . . . Agreement".

The Eleventh Circuit's ruling, puts at risk Texas Breach of Contract Claims, as articulated in: *Prudential Securities, Inc. v. Casey M. Haugland,* 973 S.W.2d 394 (Tex. App. 1998), *"Elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach."*

Not only are Texas Contract Claims at risk, but the United States explicit, defined and dominant federal Contract Law Principles are at risk as well, as referenced in: Section 716, Am. Jur., *Contracts,* "The word *"**breach**"* as applied to **contracts** is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a **contract**, including the refusal of a party to recognize the existence of the **contract** or the doing of something inconsistent with its existence." The Gangale

Agreement "is merely contract and hence is subject to all rules and requirements of Contract Law" *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 462 F.2d 673 (C.A. 2 N.Y. 1972).

The record demonstrates that the courts below shirked their duty to perform an independent adjudication of the issues raised by rubber stamping the award, which runs contrary to all federal laws.

CONCLUSION

Petitioner respectfully suggests that the Eleventh Circuit's departure from this Court's decision in *Gallagher*, and other citations, presents important questions and effects public policy warranting review by this Court. Rule 10(a)(c.)

"If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the *reality* of control by Article III judges over the *interpretation, declaration, and application of federal law.*" *Pacemaker Diagnostic Clinic of America, Inc. v. Instro-Medix*, 496 U.S. 826 (1984)

The *reality* is however, that this Petitioner has repeatedly and unsuccessfully indicated to the courts below that Penson's arguments must fail: *"no citations of law have been provided in support thereof."* (App. 30) And: there is not one shred of evidence whatsoever to support any of their contentions. Penson has no defenses. At best, all they can do is to continue to distort the truth.

The abuse of power by arbitrators is further addressed in: *Anthony P. Miller v. Wilmington Housing*, 179 F. Supp. 199 (D.C. Del. 1959) "It is not necessary, in order

for court to set aside decision, . . . that conduct of arbiter amount to actual fraud, and finding of decision will be set aside if it is fraudulent or was *induced by such inattention or indifference* as to imply bad faith, or if decision was so arbitrary and *grossly erroneous as to constitute bad faith,* or gross mistake of such character as to *amount to palpable and substantial wrong.*" (Emphasis added)

It is important for this Court to declare that the Federal Judiciary will not shirk responsibility on the grounds that judicial intervention in arbitration cases would choke already congested dockets; in cases where **all the law** and **all the evidence** on record supports an injured party; when there is clear evidence of arbitrator **abuse of power;** when there is clear evidence of **Manifest Disregard of Law;** when an award is made not by **independent judgment** but by improper instructions on an **issue of law;** The denial of justice is simply unfair, unjust and immoral.

The Gangale arguments should not continue to fall on deaf ears. To do so would be a continuation of a *greater* manifest disregard of the law and a *greater* failure of duty, by the very judicial body sworn to adjudicate the law.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

DOMINIC F. GANGALE
DALE M. GANGALE
Pro Se – Petitioner
307 Hillcrest Drive
New Philadelphia, Ohio 44663

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15909
Non-Argument Calendar

D.C. Docket No. 00-01151-CV-T-27F

DOMINIC F. GANGALE,
DALE M. GANGALE,

Plaintiffs-Appellants,

versus

PENSION FINANCIAL
SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed May 3, 2001)

Before ANDERSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiffs Dominic F. and Dale M. Gangale appeal the district court's order confirming an arbitration award entered in their favor against Defendant Penson Financial Services, Inc. ("PFS") and denying their motion to correct, modify, or (alternatively) vacate that award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

The Gangales argued to the district court that the arbitration panel manifestly disregarded clearly applicable law by awarding damages calculated according to the method set out in *Gallagher v. Jones*, 129 U.S. 193, 200-02, 9 S.Ct. 335, 337-38 (1889) (measuring damages for a broker's liquidation of positions in a stock when not instructed to do so by "the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated."), rather than as set out in *Mercantile Holdings, Inc. v. Keeshin*, 633 N.E.2d 805, 807 (Ill. App. Ct. 1993) (measuring damages for the breach of an agreement to repay another's debt, which led the creditor to liquidate stock held as collateral for that debt, by "the highest value of the stock between the date of the breach and the date that the judgment was entered, and any lost dividends"). They also argued that the arbitrators' refusal to admit a memorandum prepared by Mr. Gangale demonstrated evident partiality on the part of the arbitrators.

The district court confirmed the arbitration award after concluding that the district court had applied the proper measure of damages and that the Gangales' allegation of partiality was without merit. The Gangales now appeal, repeating the arguments they made to the district court.[1]

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[1] In their appellate brief, the Gangales cite as additional evidence of bias the assessment against them of a portion of the arbitration costs and the arbitration panel's alleged acceptance of an additional case submitted by PFS after PFS told the panel

As we review the order confirming the arbitration award and denying the motion to correct, modify or vacate it, we accept the district court's findings of fact unless clearly erroneous, but we review questions of law *de novo*. *See Gianelli Money Purchase Plan and Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1311 (11th Cir.), *cert. denied*, 525 U.S. 1016 (1998). Moreover, it is well settled that judicial review of an arbitration award is narrowly limited. *See, e.g., Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997).

Based upon our review of the entire record and consideration of the arguments raised in the briefs, we find no reversible error and affirm.

The facts of the case are relatively straightforward. In 1996, the Gangales opened a securities brokerage account with PFS, as clearing broker, through Empire Financial Group, Inc. ("EFGI"), their introducing broker. Mr. Gangale proceeded to trade options on margin in that account and the account value fluctuated significantly from month to month. At the end of December 1997, when the account had a negative net value of almost $400,000, PFS notified Mr. Gangale through EFGI that it would liquidate the positions in the account unless additional collateral were placed in the account. After some negotiation, Mr. Gangale and PFS entered into a Memorandum of

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that it would submit no further cases. Although is would make no difference to the disposition of this appeal, we will not consider this additional evidence as it was not raised in the district court. *See FDIC v. Verex Assur., Inc.*, 3 F.3d 391, 395 (11th Cir. 1993).

Agreement pursuant to which Mr. Gangale made a collateral assignment of two notes with a face value[2] totaling $1,000,000 (the "Collateral Notes") and PFS agreed that

> Providing the absence of further account deterioration as it relates to account balances as of Dec 29, 1997, Penson will allow Gangale to 'roll forward' any option position and generally allow Gangale to trade on the account, with the intent to betterment the capitalization of said account, providing no additional risk is created.

In February 1998, EFGI (which was not a party to the Memorandum of Agreement) requested additional margin and, when no additional margin was provided, ordered the liquidation of the positions in the Gangales' account.[3] After liquidation, there was a negative net balance of over $13,000 in the account (not counting the Collateral Notes, which PFS held until the Gangales initiated the arbitration proceeding).[4]

In April 1998, the Gangales filed a statement of claim with the Arbitration Department of the National Association of Securities Dealers, alleging that they had suffered significant losses because PFS had liquidated their

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[2] The actual value of the Collateral Notes has never been determined as PFS was unable to obtain any financial data regarding their maker.

[3] EFGI was liable to PFS for losses in the Gangales' account and had a contractual right under the Gangales' account agreement to terminate the account.

[4] The Gangales allege that the Collateral Notes were held to force the Gangales to accept a release, while PFS says it merely held them until it received the $13,400 the Gangales owed on the account.

account even though the account had not deteriorated. In the arbitration, the Gangales submitted an expert's report calculating damages according to *Mercantile Holdings*, 633 N.E.2d at 807, showing that, had the account not been liquidated and Mr. Gangale's trading strategy been followed, his account would have increased in value by $1,232,437. PFS contested liability in the arbitration and also submitted an expert's report on the issue of damages, calculating damages according to *Gallagher v. Jones*, 129 U.S. at 200-02, 9 S.Ct. at 337-38. PFS's expert showed that, if PFS were liable to the Gangales at all, the damage they suffered was only $26,924.88, the net difference between the liquidation prices for the positions and the highest prices for those positions over the following five days. Although the arbitrators did not state the method they used for calculating damages, they awarded the Gangales $26,924.88, so the Gangales assume that *Gallagher v. Jones* was followed.

Near the end of the arbitration proceedings and after both parties rested their cases, the Gangales attempted to submit a document authored by Mr. Gangale and entitled "Claimant's Memorandum and Conclusion of Law." PFS objected that the document contained a narrative by Mr. Gangale that could be considered evidence and which they would not be able to cross-examine. The Gangales' counsel offered to stipulate that the document was not being offered as evidence and the arbitration panel decided to accept it and allow PFS two weeks to file a responsive memorandum. The chairman of the panel stated his reservations about a memorandum of law not authored by a lawyer, but emphasized that he would not be influenced by the authorship of the memorandum.

After a brief recess, the Gangales decided to withdraw the memorandum, other than the citations to cases contained therein, removing the concern that the memorandum might contain un-cross-examined evidence and obviating the need to allow PFS to file a responsive memorandum.

The arbitrators issued their decision in March 2000, awarding the Gangales $26,924.88 and assessing a portion of the arbitration expenses against both parties. The Gangales filed a motion to correct, modify or vacate the award with the district court, and when the district confirmed the award, filed this appeal.

There is no merit to the Gangales' claim that, in calculating their damages according to *Gallagher v. Jones*, rather than *Mercantile Holdings*, the arbitration panel manifestly disregarded clearly applicable law. Although federal courts can vacate an arbitration decision when the arbitrators manifestly disregard the law, this ground is a very narrow one. *See Montes*, 128 F.3d at 1461-62. "To manifestly disregard the law, one must be conscious of the law and deliberately ignore it." *Id.* (holding that manifest disregard for the law was shown when the panel found for a defendant who conceded that the applicable statute mandated an award for the plaintiff, but claimed that the panel was not bound by the applicable statute and pled with the panel to "do what is right" rather than what the statute required). Mere "misinterpretation, misstatement or misapplication of the law," however, does not provide a basis for vacating an arbitration award, *id.*, and that is the most the Gangales have shown.

Gallagher v. Jones measured the damages suffered by a broker's customer when the broker sold stock from a customer's account without instructions to do so, notwithstanding an agreement that the stock would only be bought and sold on the customer's orders. *See* 129 U.S. at 195-96, 9 S.Ct. at 335-36. It has been adopted and applied in similar cases by the courts of Texas (whose law governs the Gangales' account agreement, account, and all transactions therein).[5] *See Reed v. White, Weld & Co., Inc.*, 571 S.W.2d 395, 397 (Tex Ct. App. 1978).

Mercantile Holdings, on the other hand, is an Illinois case involving plainly distinguishable circumstances. The Gangales offer no reason to believe that the arbitration panel's decision to apply the measure of damages adopted by the Supreme Court and the courts of Texas for cases where a broker violates a contract by liquidating securities positions was anything more than a misinterpretation or misapplication of the law (if it was even that). Accordingly, they have not shown a "manifest disregard for the law" by the arbitration panel. *Montes,* 128 F.3d at 1462 (emphasizing and narrowness of this ground for vacating an arbitration decision).

There is also no merit in the Gangales' contention that the arbitration panel's refusal to admit a memorandum prepared by Mr. Gangale demonstrated evident partiality

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[5] The Gangales' account agreement stated that Texas law would govern that agreement, the account, and all transactions in the account. Although the Memorandum of Agreement has no explicit choice of law clause, it is either governed by Texas law or Florida law, which appears to follow a similar rule. *See Klein v. Newburger Loeb & Co.*, 151 So.2d 879, 880-81 (Fla. 3rd DCA 1963)

on the part of the arbitrators. To vacate an arbitration award under 9 U.S.C. § 10(a)(2) for "evident partiality," the party challenging the arbitration award must establish a "reasonable impression of partiality" which is "direct, definite and capable of demonstration rather than remote, uncertain and speculative[;] . . . the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Lifecare Intern., Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (citations and quotation marks omitted).

Our review of the transcript of the arbitration showed that the arbitrators did not, in fact, refuse to admit the memorandum – the Gangales voluntarily withdrew it from their consideration. Although one member of the panel expressed reservations about the fact that a non-lawyer had prepared a memorandum of a law (which memorandum he had not yet seen), he also stated that those reservations would not influence him in any way in rendering a decision. This does not amount to evidence of the "evident partiality or corruption in the arbitrators," that would justify vacating the arbitration decision under 9 U.S.C. § 10(a)(2).

Because the Gangales have not established a basis for vacating the arbitration award, the district court's order is affirmed.[6]

AFFIRMED.

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[6] In light of this resolution of the case, PFS's motion to dismiss the appeal is DENIED as moot.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DOMINIC F. AND DALE M. GANGALE

Petitioners,

v.

PENSON FINANCIAL SERVICES, INC.,

Respondent.
_____/

CASE NO: 8:00-CV-1151-T-30F

ORDER CONFIRMING ARBITRATION AWARD

(Filed Oct. 5, 2000)

THIS CAUSE is before the Court upon Petitioners' Motion to Correct or Modify Arbitration Award (Dkt. #1), Respondent's Answer thereto (Dkt. #7), and Respondent's Motion for an Order Confirming the Arbitration Award (Dkt. #6), and the Court having reviewed the memoranda of the parties and being advised in the premises, determines that it is appropriate to deny the relief sought by Petitioners and to confirm the arbitration award.

The legal standard for modifying an arbitration award is found in the Federal Arbitration Act, 9 USC § 11, which states in pertinent part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon application of any to the arbitration –

> (a) where there was an evident material miscalculation of figure or an evident material mistake in the description of any person, thing, or property referred to in the award . . .

Here, there was not an "evident material miscalculation of figures" as contended by Petitioners. The arbitration panel used the appropriate measure of damages as expressed in *Reed v. White Weld and Co., Inc.*, 571 SW 2d 395 (Texas Civ. App. Texarkana 1978) and *Galigher v. Jones*, 9 S.C. 335 (1889).

Petitioners' second ground for modifying or vacating the arbitration award is without merit. Therefore, it is

ORDERED AND ADJUDGED as follows:

1. Petitioners' Motion to Correct or Modify Arbitration Award (Dkt. #1) is DENIED.
2. Respondent's Motion for an Order Confirming the Arbitration Award (Dkt. #6) is GRANTED. The arbitration award is hereby CONFIRMED.
3. Respondent's request for costs and attorney fees related to its Motion to Confirm is denied.
4. Any other pending motions are moot.
5. The Clerk is directed to close this file.

DONE AND ORDERED at Tampa, Florida, on this 4 day of October, 2000.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES
DISTRICT JUDGE

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Counsel/Parties of Record

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15909-AA

DOMINIC F. GANGALE,
DALE M. GANGALE,

Plaintiffs-Appellants,

versus

PENSON FINANCIAL SERVICES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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(FILED June 12 2001)

BEFORE: ANDERSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellants, Dominic F. Gangale and Dale M. Gangale, is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

Case No. 00-15909-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOMINIC F. and DALE M. GANGALE,

Appellants

vs.

PENSON FINANCIAL SERVICES INC.

Appellee

ON APPEAL FROM THE UNITED STATED DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF ON BEHALF OF APPELLANTS

DOMINIC F. GANGALE
PRO SE
307 HILLCREST DRIVE
NEW PHILADELPHIA, OHIO 44663
(330) 343-9003

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Those persons or other entities having an interest in the outcome of this case are:

1. Hon. James S. Moody, Jr., U. S. Judge, Middle District of Florida
2. Dominic F. Gangale, Appellant, Claimant
3. Dale M. Gangale, Appellant, Claimant
4. Penson Financial Services Inc. Appellee, Respondent
5. Hon. Burton W. Wiand Counsel for Penson
6. Hon Wm. David Simmons, Counsel for Penson
7. National Association of Securities Dealers
8. Sheryl L. Loesch, U.S Clerk, Middle District Court, Florida

/s/ Dominic F. Gangale
Dominic F. Gangale

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that the issues presented in this case can be adequately presented in brief, but appellant stands ready to participate in oral argument should the Court desire same. The principal issues in this case are the District Court's treatment of well established Principals of Contract Law and the Forceful Position taken by the Chairperson with regard to Gangale's Memorandum submission. It is believed that the arguments on those issues could be adequately presented in brief.

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STATUTES

Rule 2520 of the NASD Manuel

STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter in that this appeal is from a final decision from the U. S. District Court for the Middle District of Florida, and jurisdiction is conferred by 28 U.S. C. 1291.

STATEMENT OF THE ISSUES

A) MANIFEST DISREGARD OF APPLICABLE LAW.

THE GANGALE v. PENSON CASE HAS BEEN RECOGNIZED BY THE ARBITRATORS, EXPERTS, AND PARTY MEMBERS TO BE A UNIQUE AND NEVER BEFORE SEEN CASE FOR WHAT REASON? WITH RESPECT TO SUCH REASON, WHAT WERE THE PARTIES DUTIES?

OTHER THAN BY CONTRACT – HOW BETTER DO PARTIES MEMOROLIZE THEIR INTENTIONS?

WHAT BETTER WAY TO DEMONSTATE A MANIFAST DISREGARD OF APPLICABLE BREACH OF CONTRACT LAW THAN BY QUOTING THE VERY OFFENDER? IF AN ARBITRATOR RECOGNIZES THE UNIQUENESS OF A CASE, BY STATING IN CLOSED EXECUTIVE SESSION *"I think this is one case in Zillion where they . . . where it worked out this way, where the guy responsible, the clearing broker, entered into the agreement; isn't that stupid?"* (Transcript "C" Bk I Pg 25 Ln 13) THEN PROCCEEDS TO DISREGARD THAT VERY RECOGNITION, IS THAT NOT A MANIFAST DISREGARD OF APPLICABLE LAW?

B) PARTIALITY

IF AN ARBITRATOR IS TRULY UNBIAS AND IMPARTIAL, (AGAIN IN CLOSED EXECUTIVE SESSION), AND IMPARTIALITY REQUIRES NOTHING MORE THAN RULING ON THE MERITS, WHY WOULD AN AGREEMENT? – *"And then – and then –*

that's what fucked us up."? (Transcript, "C" Bk I, Pg 25 Ln 21)

DOES AN ARBITRATOR *EXCEED HIS SCOPE OF AUTHORITY* WHEN, DURING THE COURSE OF A HEARING, THE ARBITRATOR CONTINUEOUSLY ARGUES HIS DISPLEASURE IN A MEMORANDUM PREPARED BY A NON-ATTORNEY, DEBATING THE ISSUE HEATEDLY FOR HOURS, REQUIRING TWO SESSION BREAKS AND A NUMBER OF OFF THE RECORD DISCUSSIONS, ULTIMATLY PREVAILING IN FORCING GANGALE TO WITHDRAW HIS MEMORANDUM?

WHAT IS IT WHEN OPPOSING PARTIES STIPULATE TO CERTAIN TERMS AND CONDITIONS IN THE PRESENCE OF ARBITRATORS, WHEN NO SOONER ARE THE WORDS RELEASED, AND THE ARBITROTOR INVITES AND SEEKS DATA FROM ONE OF THE PARTIES THAT DIRECTLY VIOLATES THE JUST AGREED UPON TERMS?

IS AN ARBITRATOR'S USE OF EXCESSIVE PRESSURE *EXCUSABLE OR DIMINISHABLE* BECAUSE GANGALE EVENTUALLY WITHDREW HIS MEMORANDOM?

WHAT CAUSES OUR SYSTEM OF JUSTICE TO FAIL WHEN ALL THE EVIDENCE AND ALL THE LAW IS IN SUPPORT OF THE NON-PREVAILING PARTY? WITH RESPECT TO THAT FAILURE, WHAT ARE THE DUTIES AND RESPONSIBILITIES OF HIGH COURTS?

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On April 10, 1998, the Gangale's filed a Claim against Penson Financial Services Inc. Containing therein: Count I ***Fraudulent Inducement,*** Count II, ***Breach of Fiduciary Duty,*** Count III, ***Negligence,*** and Count IV, ***Breach of Contract.*** (Emphasis added, Exhibit 1)

Respondent (Penson) filed an Answer on June 19, 1998. (Exhibit 2)

Arbitration hearings were held in Tampa Bay, Florida beginning in August 3, 1999. Not concluding the hearings in the allocated time, new dates were selected to conclude the case. Mr. Clark, industry arbitrator died prior to the hearing date. A new arbitrator was selected and the hearings resumed on February 23, 2000 (Transcript "C" Bk II Pg 4-6)

In the Case Summary, which is part of the Award, it is noted that *"Claimants seek to recover compensatory and punitive damages from Respondent for* ***fraudulent inducement, breach of fiduciary duty, negligence and breach of contract.***" And that *"Respondent is liable for, and shall pay, compensatory damages to Claimants in the amount or $26,924.88"* (Exhibit "A")

On June 12, 2000 Claimants filed with the United States District Court, Middle District of Florida, a *Motion to correct or modify arbitration award or, alternatively, motion to vacate arbitration award,* based on the following primary issues: (Exhibit 24)

A) "The arbitrators properly concluded that Penson breached its contract with Gangale and should have awarded damages based upon such breach."

B) "Alternatively, this Court should modify and/or vacate the award in the instant action pursuant to 9 U.S.C. Sec.10 because the arbitration panel misbehaved when it refused to admit a memorandum prepared by Gangale thereby demonstrating partiality against Mr. Gangale and prejudicing his rights."

On or about July 19, 2000 Penson filed an *Answer to Petitioners' motion to correct or modify arbitration award, or alternatively to vacate arbitration award* together with a *Motion to confirm arbitration award,* and *Memorandum in opposition to petitioners' motion to correct or modify arbitration award, or alternatively to vacate arbitration award.* (Exhibit 23)

On October 5, 2000 the United States District Court, in a decision adverse to the Gangales' decided and: ***"determines that it is appropriate to deny the relief sought by petitioners and to confirm the arbitration award"*** (Exhibit 21)

Gangale filed a Notice of Appeal To Eleventh Circuit Court of Appeals on November 2, 2000, and the case stands before this Court.

B. STATEMENT OF THE FACTS

In February of 1997, Gangale transferred into the Penson Account approximately $1,300,000. with the account having a Net Equity on February 28,1997 of $1,314,291.

As a result of Penson's inability to correctly calculate margin requirements and/or their failure to apply applicable regulatory compliance requirements, the account experienced wide fluctuations in value.

On or around December 22, 1997, management of Penson and Empire, realizing that the Gangale account has a **deficit** Net Equity of $400,000 are faced with what they determine to be two possibilities:

"There was really a couple of issues. One, Empire indicated that if we – if the account was sold out and there was a 400,000 debit balance, that that would potentially cause them to close.

And secondly, it was our perspective under this agreement, even though we couldn't establish a value for the note, that we weren't any worse off with the additional collateral that Mr. Gangale was offering and as long as the account didn't deteriorate any further, that we were willing to give he and Empire time to work this situation out." (Exhibit "C" Bk II Pg 132 Ln 3)

Penson elects to choose the later. The Memorandum of Agreement is drafted by Penson. Gangale, noting that the agreement – as drafted – did not reflect the terms as discussed, made changes. Penson accepts the revisions and executes the agreement. Gangale assigns the One Million Dollar notes to Penson.

Commencing on or about February 18, 1998, with the Gangale account now standing at plus $380,000 in equity, exclusive of the Gangale notes, liquidation begins: due to a just issued and immediately payable maintenance call.

Empire's justification for issuing the maintenance call: ***"The reason why I called is Penson had received the correspondence back from Guttisgerg Cheese. I'm sure I***

didn't pronounce that correctly. And in it, there was no financials. And due to the inability of them to get financials to substantiate the validity of the note or the strength of the note, they've elected to issue a maintenance call for $250,000 payable immediately." (Exhibit "G" Pg 8)

However, it was the testimony of Penson's Philip Pendergraff that in a telephone conversation between Empire's Mr. Kevin Gagne and Penson that: *"Well, sometime in late February, Mr. Gagne* **(Empire)** *called and asked that Penson take the account directly on its books and that Empire be removed as introducing broker on the account."* (It should also be noted that the taped conversation in question was never made available to the Gangale's). (Transcript "C" Bk II Pg 96 Ln 11)

Penson refused, understandably so, why give up one of your recourse options? In retaliation to Penson's refusal to remove Empire from any responsibility with respect to the Gangale account, Empire, out of the clear blue and without reason, requested that Penson issue a Two Hundred Fifty Thousand Dollar maintenance call. Penson did as instructed.

At the commencement of the hearings, held in Tampa Bay Florida, Penson stipulated to the validity of the Memorandum of Agreement. (Exhibit "B")

Penson's Vice President Mr. Pendergraff testified:

"No, we agreed under the terms of this agreement not to liquidate based on certain criteria, to forego some of our existing rights." (Exhibit "C" Bk II Pg 126 Ln 3)

"We would not – we would not have liquidated the account and I believe that's my testimony." (Exhibit "C" Bk II Pg 126 Ln 14)

"It did not go below the $400,000 negative; that's correct." (Exhibit "C" Bk II Pg 142 Ln 8)

"Yes, sir, we have said that based on these clauses in this agreement we will not liquidate the account." (Exhibit "C" Bk II Pg 171 Ln 20)

Penson's Mr. Pendergraff testified that Penson's computer system was not capable of determining the correct maintenance requirements in the Gangale account. (Exhibit "C" Bk II Pg 191 Ln 12)

Penson's continues to rely on false and misleading statements, making clarification of the facts necessary, maintaining that: *"Petitioners were public customers of Empire Financial Group ('Empire") which clears securities transactions through Penson"*. The evidence however, illustrates otherwise.

(a) The first sentence of the Memorandum of Agreement, drafted by Penson, on Penson letterhead, states: ***"Whereas Dominic F. Gangale ("Gangale") is a customer of Penson Financial Services Inc. ("Penson")*** (Exhibit "B")

(b) Rule 2520 of the NASD Manual defines the term "Customer" as follows: *"The term "customer" means any person for whom securities are purchased or sold or to whom securities are purchased or sold whether on a regular way, when issued, delayed or future delivery basis.* ***It will also include any person for whom securities are held or carried and to or for whom a member organization extends, arranges or maintains any credit."***

c) Penson's own testimony: *"For the purposes of the customer protection rule, it means that those balances* (account) *and the underlying* ***customer securities are the safekeeping responsibilities of the Clearing broker.*** *You*

can't give them to the introducing broker. And for purposes of fraud, those securities are under our fidelity bond. So we are the safekeeping agent that acts on behalf of the introducing broker and its customers. (Transcript "C" Bk II Pg 10)

Again, lacking any factual support, Penson continues an attempt to distort the facts by making statements such as, *"Gangale continued his highly speculative trading"* when in fact the record is clear that Gangale simply wanted to maintain and gradually work out of his position. Further, he needed prior approval for anything that had to do with the account.

Kevin: (Exhibit "G" Pg 7) ***"But until that happens, you don't have immediate access in your account. You need to get approval."***

Pendergraff: ***"No, sir. I approved transactions which potentially could have violated this agreement, Primarily opened transactions.*** (rolling positions forward) (Transcript "C" Bk II Pg 164 Ln 15)

And as much as Penson tries to mischaracterize the facts, by making false and misleading statements, close scrutiny of the record and evidence will speak for itself. Perhaps the records best evidence:

Dominic: ***"Have I told you anything that I haven't done?"***

Kevin: ***"No you have not. No you have not."*** (Exhibit "G" Pg. 20)

Liability in the Gangale case was so obvious that in reality, the arbitration panel did not even deliberate on that issue. As illustrated by Mr. Adler's comments in his last few sentences: ***"I've got to tell these guys what I think the applicable law is and it would be better if Mr.***

Simmons was permitted to do that. (Transcript "C" Bk III Pg 164 Ln 20)

For a more complete understanding of the intricate details of the Gangale case, your attention is directed to the Gangale memorandum. (Exhibit "G")

STATEMENT OF STANDARD OF REVIEW

The courts role in reviewing claims under the Federal Arbitration Act ("FAA"). Sections 1-16 of Title 9 of the United Stated Code, is a narrow one. Vacating an arbitration award however, is warranted upon the following;

(2) *Where there was evident partiality or corruption in the arbitrators, or either or them.*

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (emphasis added)

(4) Where the arbitrators exceeded their powers, . . .

Or, where there is evidence the arbitrators ***"Manifestly disregarded the law"***. A manifest disregard of the law is judicially created ground for vacating arbitration award, and refers to error which was obvious and capable of being readily and instantly perceived by average person qualified to serve as arbitrator; doctrine implies that arbitrator appreciates existence of clearly governing legal principle but decides to ignore or pay no attention to it. See **Wilko v. Swan, Montes v. Shearson,** and **Carte Blanche.**

In the Gangale case, the issues of a Memorandum of Agreement were presented during the course of Five days,. The record undisputedly indicates that both claims Gangale has before this court are present. And the record also indicates that there is not one single speck of evidence to indicate non-compliance of the Agreement by Gangale.

As such, the fundamental principles of applicable Contract Law must be applied and Gangale's fundamental rights should not have been deprived.

SUMMARY OF THE ARGUMENT

At the heart of Penson's contention is the theory that if an account is liquidated, ***no matter what the terms and conditions of the contractual agreement,*** and said liquidation is wrongful, the case falls in the wrongful liquidation theory, no matter how you slice it.

However, there is no credible way in which we can accept that argument **Contract law** dispenses Penson's theory; **High Courts** have gone to great lengths to place limitations on wrongful liquidation cases. And **Rational Reasonable** minds would never buy into that theory.

Therefore, the very contractual instrument that has bound the Gangales' to arbitration, must also bind Penson to their promises and obligations.

Gangale has met the burden placed upon him to demonstrate that the arbitrators **Manifestly Disregarded the Law**: That Gangale for whatever the worth, should not have been deprived of his **Fundamental Rights**: That arbitrators **Exceeded Scope of Authority**: That the record

demonstrates **Partiality** with regard to accepting the Gangale Memorandum as was ruled upon. And that there was **Partiality** demonstrated when the arbitrators simply ignored the agreed upon terms which the memorandum withdrawal was conditional upon.

This honorable Court is now vested with the responsibility and burden of determining what is just, fair and proper.

ARGUMENT

A) MANIFEST DISREGARD OF APPLICABLE LAW.

The distinction between a ***wrongful liquidation*** case and a ***breach of contract*** case is both clear and simple. Under the **Galigher v. Jones** (wrongful liquidation) or any other case Penson may cite, the Broker-Dealer **Has the Contractual Right to Liquidate.** That contractual right is clearly spelled out under the standard Customer Agreement. Liquidation however; ***"must be excised in good faith under the existing facts and circumstances."*** See **Cauble v. Mabon Nuget & Co.**

If liquidation take place **outside** the parameters established by high Courts as being prudent and reasonable: Bingo: **We have a wrongful liquidation case.**

THE GANGALE'S BROUGHT A *BREACH OF CONTRACT* ACTION AGAINST PENSON. THE CAPTIONED CASE WAS ARGUED UNDER A BREACH OF CONTRACT THEORY. AN ORDER FROM THE DISTRICT COURT TO VACATE WAS JUSTIFIED BASED ON THE EVIDENCE AND APPLICABLE LAW.

Each and every one of Penson's contentions is flawed. The Gangale case differs in **Three Fundamental Elements** from typical wrongful liquidation cases, thus, could never fall into the wrongful liquidation category:

1) Foremost, unlike any other case cited by Penson, the Gangale case involves an unprecedented written agreement between the parties which barred Penson from liquidating the account except under certain conditions. (Exhibit "B")

2) Penson having been so negligent Pre-Agreement in mishandling the Gangale account by their inability to correctly calculate the margin requirements, granted concessions to Gangale, per the Memorandum of Agreement, that would otherwise not be granted to anyone. Thus, the Gangale account took the form of a Van Gogh that could not be duplicated, as opined by Penson's own expert witness *"Unique, never before seen"*.

3) Lastly, the wrongful liquidation theory would not be applicable if we are mindful that Penson, by defiantly refusing to relinquish the Gangale notes for a period of nearly eight months, unless the Gangale's signed a general release, made covering an impossibility. Thus, Penson took away Gangale's ability to cover and deprived him of his property. (Exhibits " C-13, C-14, C-16, C-18")

Although Penson presently speaks of: ***"perhaps we should have returned the notes earlier"***, their actions and evidence with regard to the non-returning of the Gangale notes, indicates otherwise.

Texas Courts are clear on Breach of Contract Claims, (as filed by the Gangale's) as carefully addressed in **Prudential Securities, Inc., v. Casey M. Haugland, 973 S. W.2d 394 (Tex. App-El Paso 1998)**

"Elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach."

Further, as pointed out in **Cauble v. Mabon Nuget & Co.**

"promissory statements relating to future acts which constitute contractual obligations themselves; failure to perform such promises of future acts is actionable in a suit for breach of contract."

Even when addressing Wrongful Liquidation cases, cases in which clearing brokers have a clear contractual right to liquidate, High Courts have seen fit to caution that the wrongful liquidation net should not be woven so tightly as to catch every case in the oceans of litigation.

Penson reliance upon the Texas case of; **Reed v. White, Weld & Co., Inc. 571 S. W.2d 395 (Tex. Civ. App. Texarkana, 1978)** to support their contentions fails. **Reed,** following the logical methodical reasoning of the U.S. Supreme Court cornerstone case regarding wrongful liquidation: **Gallagher v. Jones,** the Court of Civil Appeals of Texas, Cornelius, C. J. held:

"that even though sale of securities was wrongful, where Plaintiffs did not seek to recover market value of securities, where plaintiffs conceded that such value had been paid, and where there was no pleading for special damages of any kind but only for interest which plaintiffs alleged they could have earned if they still held securities, plaintiffs received all damages legally recoverable by cause of action they pleaded," (emphasis added)

The Court further emphasized that: *"In the absence of special circumstances which might dictate otherwise . . . "* Which indicates that in cases where there is a clear agreement to forbear liquidation, **Gallagher,** would not be applicable. Thus, **Reed,** is consistent with, and followes the logical reasoning that it is Harmless Error when liquidation takes place within a parties right to liquidate, and the injured party is fully compensated for any wrongful error.

Penson position is that if an account is liquidated, **no matter what the contractual terms and conditions,** and the liquidation was wrongful, that case should fall into the category of a wrongful liquidation case. That argument however must fail: no citations of law have been provided in support thereof.

To buy into Penson's Wrongful Liquidation theory would require us to also buy into the theory that no parties could contractually agree to certain promises and conditions with respect to securities.

In **Cauble v. Mabon Nuget & Co. 595 F. Supp. 985 (S.D.N.Y. 1984)** the Court addresses the basic boilerplate agreements by stating:

"Moreover, where a customer agreement is in effect, the broker does not have unbridled discretion to liquidate an account; its power to liquidate must be exercised in good faith under the existing facts and circumstances,"

And in **Lichter v. Dean Witter Reynolds Inc. 570 F. Supp. 533, 536 (N.D. Ill. 1983)**

"It is not as though Pain Webber had converted an irreplaceable Van Gogh."

And to better understand how inappropriate the **Galigher vs. Jones** damage calculations are with regard to the Gangale case, we need to ask: If Gangale could have reestablished his positions elsewhere, why would he put at risk an additional One Million Three Hundred Thousand Dollars, in order to maintain the status quo positions?

Further, when carefully analyzed, covering, under the wrongful liquidation theory, would have been applicable to Penson, *NOT* Gangale. Penson should have reestablished the Gangale positions (as Mr. Gangale recommended) when Penson ***allegedly*** learned of the liquidation: For Penson had the responsibility to safeguard the Gangale securities; Gangale had assigned One Million Dollars to Penson to procure the Agreement that no liquidation would take place in *"the absence of further account deterioration as it relates to account balances as of Dec. 29, 1997"*. (Exhibit "B")

A ***"manifest disregard of the Law" might be present authorizing vacation or setting aside of an arbitrators' award when the arbitrators understand and correctly state the law but proceed to disregard it.*** **San Martine Companis De Navegacion, S.A. v. Saguenay Terminals Limited, 293 F. 2d 796 (C.A. 9 1961)**

The Eleventh Circuit has defined a manifest disregard of law as where an individual is conscious of the law yet deliberately ignores it. **Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456 (11th Cir 1997)**

"Should an arbitrator be guilty of manifestly disregarding the law, then reversal of the arbitrator's decision is appropriate.

In **Carte Blanch (Singapore) Pte, Ltd. v. Carte Blanche International, Ltd, 888 F. 2d 260 (C.A. 2nd 1989)** The court explains:

"Manifest disregard of the law" by arbitrators is judicially created ground for vacating arbitration award, and refers to error which was obvious and capable of being readily and instantly perceived by average person qualified to serve as arbitrator; doctrine implies that arbitrator appreciates existence of clearly governing legal principle but decides to ignore or pay no attention to it."

By everyone's acknowledgment, the Gangale case is a unique and unprecedented case where the Gangale's established a direct contractual relationship with a clearing broker. As such, perhaps the case that comes closest in similarity is: **Mercantile Holdings, Inc. v. Keesshin 261 Ill. App. 3d 546 (1993)**

"The gist of this case is not a wrongful sale of the stock by Mercantile, but rather the gist of this case is a wrongful breach of the assignment agreement. . . . Schaider & Keeshin's argument overlooks the fact that they are not being assessed damages because Mercantile wrongfully sold L.C. Keeshin's stock, rather they are being assessed damages because they breached the assignment agreement. Thus this is a contract case."

Thus, the **Assignment agreement** made **Keesshin** a contract case and the **Memorandum of Agreement** makes the Gangale case a contract case.. And the applicable principles of well established law as provided in **Mercantile v. keeshin** apply.

"the proper measure of damages in a common law breach of contract case is one which places the party entitled to damages in the same position at the time of

judgment as he would have been in had the breach not occurred."

Lafarge Corp. v. Wolff, Inc. 977 S.W. 2d 181 (Cr. App. Tex. 1998)

"The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained." "To restore an injured party to the position he would have been in had the contract been performed, it must be determined what additions to the injured party's wealth have peen prevented by the breach and what subtractions from his wealth have bees caused by it."

White v. Southwestern Bell 651 S.W.2d. (Sup. Ct. Tex. 1983)

"to recover for a loss of profits, it is not necessary that the loss be susceptible to exact calculation. It is sufficient that the amount of loss is shown by competent evidence with reasonable certainty."

Penson's expert witness **James F. Brucki, Jr.** submitted a damage report based on the wrongful liquidation theory, opining that:

"based on my understanding of the united States Supreme Court's directions for the calculation of damages for a wrongful liquidation,. . . . If there should be a determination that the liquidation of all these positions was wrongful and that Penson is responsible. . . . The Supreme Court guidelines would total $26,924.88. (Exhibit "E")

The record is void of any evidence that disputes the accuracy of Gangale's expert report from the **Walsh Consulting Group.**. Therefore, the Gangale damages resulting from Penson's breach are $1,232,437.00. (Exhibit "D")

B) APPELANTS MOTION TO MODIFY OF VACATE AWARD BASED ON MISBEHAVIOR

Section 10 of the Federal Arbitration Act, provides:

(2) *Where there was evident partiality or corruption in the arbitrators, or either or them.* (emphasis added)

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (emphasis added)

(4) Where the arbitrators exceeded their power. . . . (emphasis added)

"When a claim of partiality as to arbitration award is made, court is under an obligation to scan record to see if it demonstrates evident partiality on part of arbitrators." See **Saxis Steamship C. v. Multifacs International, 375 F.2d 577 (C.A. N.Y. 1967)**

One of the pivotal issues regarding the bias claim is the actions by arbitrator Adler which resulted in depriving Gangale of his rights. It is clear in the record that: ***"That's the panels ruling, now let's implement it."*** Therefore, there was no just reason not to except the Gangale Memorandum because the panel had ruled to accept it.

Arbitrator Adler

> ***"We're going to have to give the respondents time to answer this memorandum and to refute it in any every way that they want to and we will then pick a day on which the memorandum will be due and there's going to be no response to the memorandum. There's going to be no reply to it that the claimants can make. . . .***

"That's the panel's ruling, now let's implement it. (Exhibit "C" Bk III Pg 91 Ln 22)

However, contrary to the ruling of the panel to accept Gangale's Memorandum, Mr. Adler takes it upon himself to engage in a crusade against non-attorneys preparing legal documents, thus exceeding his authority and misbehaving.

When considering the events leading up to the eventual withdrawal of the Gangale Memorandum, one needs to ask whether a reasonable, rational mind would have come to the same conclusion – as Gangale – to withdraw the memorandum, considering chairman Adler's position and his continuous pressure?

Arbitrator Adler: ***"But what I've heard – the thing that bothers me the most, and I'm the only lawyer on the panel, is that your side has seen fit to include something that's written by someone other than yourself*** – (Transcript "C" Bk III Pg 103 Ln 8)

Mr. Snyderburn: ***"That's not true."***

Arbitrator Adler: ***"who's not a lawyer –***

Mr. Snyderburn: ***"That's not true,"***

Arbitrator Adler: ***"or not a member of your firm."***

Mr. Snyderburn: ***"It's signed by them. You're making suppositions that I haven't read it, that I haven't adopted it."***

Arbitrator Adler ***"I happen to be the chairman of this panel, but as a lawyer, I feel badly when I'm presented with a memorandum of law that's signed by the client. I've never seen it done.*** (Exhibit "C" Bk. III Pg 104 ln 16)

> ***"But there are certain – there are certain procedural things that lawyers do among themselves and I – "I'm going to say it once more."*** (Exhibit "C" Bk. III Pg 105 ln 17)
>
> ***"I practiced law 45 years,. . . . but I never saw a memorandum of law submitted by a client. Memorandum of law in a memorandum of law. It's something prepared by a lawyer served on another lawyer presented for the consideration of the judge."*** (Exhibit "C" Bk III Pg 105 Ln 20)

After yet another session break, Gangale finally conceded to withdraw his Memorandum, even though it was read, adopted, and signed by counsel.

> Mr. Snyderburn: ***"The memo comes out, the cases stay in, and I want Mr. Simmons to agree that he won't have to – you don't have to – don't have to submit any other cases. Agreeable?"***
>
> Mr. Simmons: ***"That is agreeable with us."*** (Exhibit "C" Bk III Pg 107 Ln 23)
>
> Arbitrator Adler: ***"you don't want to reply to this?***
>
> Mr. Simmons: ***"If the memo comes out, we do not need to reply."***
>
> Arbitrator Adler ***"You're not going to furnish any citations?***
>
> Mr. Simmons: ***"None other than the ones we've already furnished."***
>
> Arbitrator Adler ***"All right. Fine. Okay . . . "***

However, contrary to the just agreed terms, stipulated minutes earlier, with closing arguments completed, with case closed except the final decision of the arbitrators, Mr. Simmons wishes to: ***"I want to interject one***

final thought –" (Exhibit "C" Bk III Pg 164 Ln 5) And arbitrator Adler continues to **eagerly seek** additional submissions for the record.

> Arbitrator Adler *"Yes."*
>
> Mr. Simmons: *"If I could be permitted, I'd like to return to my hotel room and leave with the panel a controlling Texas case that. . . . "*
>
> Arbitrator Adler: *"I would welcome it. As a matter of fact, while you were saying what you did say, I said, oh, boy, I've got to tell these guys what I think the applicable law is and it would be better if Mr. Simmons was permitted to do that."*

Lastly, the arbitration award further expresses partiality by the arbitrators. Would a rational reasonable mind continue to punish the injured party by accessing costs to that party and relieving the wrongdoer, the party found liable, from said costs?

When viewed in its totality, the record and evidence is abundantly clear the arbitrators demonstrated **partiality** in the Gangale case by **not accepting** a Memorandum that was signed and adopted by counsel, by not adhering to and breaching the stipulated terms which were **conditional** to the withdrawal of the Gangale Memorandum, and by their **actions,** which fail the rationality test.

Gangale has thus provided this court with the necessary requisite of putting forth an overabundance of evidence and law to vacate the arbitration award. As a practical matter, there is not one shred of evidence or law that would justify the confirmation of said award.

CONCLUSION

The Gangale Memorandum of Agreement was **specifically designed** to protect Gangale from the very deeds Penson now contends were wrongful. Without question, the agreement was entered into, for the **specific purpose** of ensuring no liquidation would take place "absent further account deterioration."

So this case is not a case of simple error of law: Five days were spent examining the rights and responsibilities of the parties under the four corners of the Gangale Contract. This is a case of **Manifest Disregard of Law** Chairman Adler stated it and a second arbitrator agreed: ***"I think this is one case in Zillion where they . . . where it worked out this way, where the guy responsible, the clearing broker, entered into the agreement; isn't that stupid?"*** with fellow arbitrator agreeing: ***"Really"*** (Transcript book I page 25 Line 13)

Not only did the arbitrators recognize the unique nature of the case, (***"one case in a zillion"***) but they in fact, recognized that this was a contract case. (***"entered into an agreement"***).

America has laws. And when individuals memorialize their intentions in writing, those contractual obligations bind the parties to certain rules. This is a case in which a Quasi-Bank made promises that were not kept. It is unconscionable that such injustice should be allowed to exist in United States of America.

Accordingly, Gangale respectfully submits that the arbitration award should be modified to $1,232,437.00 in accordance with law. Alternatively, this court should

remand, with instructions to follow the proper legal theory of Law. Or, alternatively, Gangale should be afforded the opportunity to present his case to a new arbitration panel.

Respectfully Submitted,

/s/ Dominic F. Gangale
Dominic F. Gangale
Appellant
307 Hillcrest Drive
New Philadelphia, Ohio 44663

Certificate of Service

I hereby certify that a true and exact copy of this Appeal from the United States District Court for the Middle District of Florida has been sent via Certified Mail on this 6th day of December, 2000 to Wm. David Simmons, Mcquire, Craddock, Strother & Hale, PC 500 N. Akard, Suite 3550, Dallas, Texas 75201

/s/ Dominic F. Gangale
Dominic F. Gangale

Case No. 00-15909-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOMINIC F. and DALE M. GANGALE,

Appellants

vs.

PENSON FINANCIAL SERVICES INC.

Appellee

ON APPEAL FROM THE UNITED STATED DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

APPELLANTS REPLY BRIEF

DOMINIC F. GANGALE
PRO SE
307 HILLCREST DRIVE
NEW PHILADELPHIA, OHIO 44663
(330) 343-9003

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ARGUMENT

Absent Facts and Law supporting their contentions, Penson continues to make misrepresentations to thus far, escape the wrath's of Justice.

Distinction Without a Difference

Perhaps the most interesting proclamation Penson's makes is: ***"There is no meaningful distinction between the two analyses. The genesis of the Gangales' complaint was that their positions were liquidated. If there is a distinction, it is one without a difference."*** States Penson on page 7 of Appellee's Brief, and without question, had Penson lived up to the promises made, there would have been no complaint.

Unfortunately, that is not the case and Penson is asking this Court to buy into the argument that the distinction between a ***Wrongful Liquidation analysis*** and a ***Contract analysis*** is one without any meaningful distinction.

The Wrongful Liquidation theory Penson relies upon is based on the fundamental element of the Broker Dealer having the legal contractual right to liquidate, and indeed must liquidate (with prudence, not unbridled) to comply with Federal Margin Requirement Rules. It is also based on the theory that the Broker dealer does nothing to impair or deprive a customer from their ability to cover.

The Gangales' filed a ***Breach of Contract Claim*** Complaint against Penson, which is significantly different from a wrongful liquidation claim.

The Van Gogh Exception

Notwithstanding that the Gangale case is a contract case, the Van Gogh argument is yet another illustration of the inapplicability of the wrongful liquidation analysis. Penson argues that the Van Gogh theory is not applicable because stocks can be bought and sold on virtually any given day. That they are easily replaceable.

The issue is ***not*** whether stocks can be bought or sold, but whether the Gangale account could have been duplicated given the circumstances that existed on or about February 20, 1998:

Consider the following:

(1) Penson testified that their computer system could not and did not determine the correct margin requirements in the Gangale account. Thus, resulting in the status it was in on or about December 29, 1997. Reestablishing said positions elsewhere would have been impossible due to the capital requirements.

(2) James Brucki, Penson's own expert witness, submitting the damage model of a wrongful liquidation report, nonetheless opined that Gangale would have needed ***"almost a million dollars additional money in this [the Gangale'] account. And we know that was an impossibility"*** (Page 15 of Appellee's Brief) Mr. Burcki thus supports Gangale's theory of the ***Value*** of the agreement between Gangale and Penson, thereby making it a Van Gogh.

(3) Additionally, Penson defiantly continued to withhold the Gangale One Million dollar notes for a period of an additional Eight months after

> liquidation had taken place, and would not return said notes unless the Gangales' signed a general ***Release.*** Only after Gangale filed a Criminal Complaint were the Gangale notes finely returned. So how could Gangale cover?

If covering was so readily available as Penson contends, then we need to ask: why would Gangale ***not*** simply cover on December 29, 1997 instead of risking One Million Dollars in Notes, plus Three Hundred Five Thousand Dollars ($305,000.00) injected into the Gangale account in the beginning of January 1998?

Penson overlooks the fact that the Memorandum of Agreement, granted concessions as a result of Penson's past sins. The Agreement, if not breached, would have allowed Gangale to maintain his positions throughout the workout period.

The argument of covering is not persuasive when a Broker deprives a customer of their bargained right, stripes them of their ability to cover by ignoring and depriving them of their rightful property.

Unanimous Decision Argument

Penson directs this courts attention to the unanimous decision of the arbitration panel. Indeed, a unanimous decision is meaningful and something to consider ***when arrived*** by experienced, knowledgeable, independent, individuals who are specialists in their respective field.

However, when you have one arbitrator who: ***"I would say this is my first panel . . . "*** (Exhibit "C" Bk II Pg14 Ln 7), and another arbitrator who: ***"Oh, boy, I've got to tell these guys what I think the applicable law is and***

it would be better if Mr. Simmons was permitted to do that." (Exhibit "C" Bk III Pg 164 Ln17) Thus, Two/thirds of the arbitrators – who were none-attorneys, as pointed out by Penson – were instructed to use a certain legal theory of Law.

Therefore, as a practical matter, the seemingly unanimous Prima Facia decision, becomes nothing more than a **decision but of one individual.** When that same individual pressured strongly and persistently for hours against the submission of the Gangale memorandum, when that individual is the one who violated the agreed terms which were conditional to the withdrawal of the Gangale memorandum, and when that individual is the one who instructs the panel on what theory of law to use, knowing full well – as the record reveals – that ***"this is one case in a zillion where they . . . where the guy responsible, the clearing broker, entered into the agreement;"*** (Exhibit "C" Bk I Pg 25 Ln 13) and ***"That's what fucked us up"***, (Exhibit "C" Bk I Pg 25 Ln 21) what do you have?

Texas Law

Pension strenuously argues that Texas law governs the instant dispute, [as provided for in the Customer Account Agreement]. Amazingly, out of ***Eleven*** cited cases in Apellee's Brief, only ***one*** is a Texas case. And ***Reed v. White*** is yet another plain garden variety wrongful liquidation case, following ***Galigher v. Jones,*** vastly different from the Gangale case.

When carefully read, ***Reed*** supports Gangale's position:

"Plaintiff's received all damages legally recoverable by cause of action they pleaded, (emphasis added)

"In the absence of special circumstances which might dictate otherwise,

The lack of authoritative Law is created by the **Unprecedented Contract** forbearing liquidation that existed between the parties. The Gangale Memorandum can not be ignored; It was created and designed for the specific purpose to ensure no liquidation would take place.

Alleged New Challenge

Penson alleges that Gangale asserts two new challenges. The new challenges are not new at all and go right to the heart of the *"partiality issue"* which has been one of the basis for this appeal. The contention that the Partiality issue is a new challenge is not persuasive and fails on two grounds; (1) *The issue or theory was raised at the District Court level.* And (2) *Refusal to consider such evidence would result in miscarriage of law.* See **Lattomore v. Oman Construction, 868 F.2d 437 (11th Cir 1989)**

Gangale further submits that by pointing to yet other clear, direct and definite occurrences of partiality, as specified in, **Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc., 146 F.3d 1309, 1310 (11th Cir. 1998)** the burden of this Court is made lighter.

"When a claim of partiality as to arbitration award is made, court is under an obligation to scan record to see if it demonstrates evident partiality on part of arbitrators," See **Saxis Steamship C. v. Multifacs International. 375 F.2D 577 (C.A. N.Y. 1967)**

Contrary to Penson's statement that *Reed v. White* was previously cited – which is not correct – the fact remains that submissions to the record were eagerly sought minutes after stipulations to the contrary were agreed upon.

Binding Agreement

Penson stipulated to the validity of the Memorandum of Agreement, binding legal recourse of any dispute to arbitration – as provided under the agreement. And further, that Texas Law shall govern.

Penson is of the opinion that the very stipulated agreement which they rely upon for their rights, only binds Gangale to its terms and conditions and not Penson.

Respectfully submitted,

/s/ Dominic F. Gangale
Dominic F. Gangale
Appellant
307 Hillcrest Drive
New Philadelphia, Ohio 44663
Telephone: 330-343-9003

Certificate of Service

I hereby certify that Two true and exact copies of this ***Appellants Reply Brief*** has been sent via Certified Mail on this 18th day of January, 2001 to:

Via Certified Mail # 7000 0520 0012 5005 5053
(Two copies)
Thomas W. Craddock

McGuire, Craddock & Strother, P.C.
500 N. Akard – Suite 3550
Dallas, Texas 75201

And Seven Copies plus Original were sent via U.S. Express Mail on the same date to:

Via U.S. Express Mail # EI596548069US
Thomas K Kahn, Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303

/s/ Dominic F. Gangale
Dominic F. Gangale

Award
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Case No. 98-01338

Names of Claimants

Dominic F. and Dale M. Gangale

Name of Respondent

Penson Financial Services, Inc.

REPRESENTATION OF PARTIES

For Claimants Dominic F. Gangale and Dale M. Gangale, hereinafter collectively referred to as "Claimants"; Philip J. Snyderburn, Esq., Snyderburn, Rishoi & Swann, Winter Park, Florida.

For Respondent Penson Financial Services, Inc. ("Penson"), hereinafter referred to as "Respondent"; Thomas W. Craddock, Esq., McGuire, Craddock, Strother & Hale, P.C., Dallas, Texas.

CASE INFORMATION

Statement of Claim filed on or about: April 10, 1998.

Claimants jointly signed the Uniform Submission Agreement: April 9, 1998.

Statement of Answer filed by Respondent on or about: June 19, 1998.

Respondent signed the Uniform Submission Agreement: June 18, 1998.

CASE SUMMARY

Claimants asserted the following: Claimants entered into an agreement with Respondent whereby Claimants were permitted to trade their account. Respondent, notwithstanding the agreement, liquidated Claimants' account. As a result of the foregoing, Claimants seek to recover compensatory and punitive damages from Respondent for fraudulent inducement, breach of fiduciary duty, negligence and breach of contract.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following: Claimants are customers of Empire Financial Group ("Empire"), which cleared securities transactions through Respondent. Claimants were investing in highly speculative options on margin. In December 1997, Claimants' investment positions had taken significant adverse turns, resulting in a deficit account balance of almost $400,000.00. Respondent issued a maintenance call through the offices of Empire. Claimants offered to pledge to Respondent two promissory notes (payable to Claimants) totaling $1,000,000.00 to satisfy the maintenance call. A Memorandum of Agreement was executed to confirm the pledge of the collateral so long as there was no additional risk or further account deterioration. Upon further considerable adverse turns in their investments and Claimants' inability to provide any assurance concerning the actual value of the pledged promissory notes, Empire determined that it could not

longer tolerate the risk to which it was exposed by Claimants' trading investments. Upon issuance of a margin maintenance call of $250,000, which Claimants conceded they could not meet, Empire instructed Respondent to liquidate the account. After liquidation of the account, there remained in the account a deficit balance of over $13,000.00 which debit was satisfied through payments received pursuant to the pledged notes. These notes were then returned to Claimants.

RELIEF REQUESTED

Claimants requested compensatory damages of $1,600,000.00; forgiveness of the $13,214.00 debit balance; return of the $1,000,000.00 promissory notes; lost profits; costs of this proceeding; pre-judgment interest and punitive damages.

Respondent requested dismissal of the claims in their entirety. Alternatively, Respondent sought an offset of $13,400.42 plus pre-judgment interest; attorney's fees; and any and all further relief to which Respondent showed itself justly entitled.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent filed a Motion to Dismiss at the conclusion of Claimants' direct case which Motion was denied by the Panel.

At the hearing in this matter, Respondent withdrew its claim for attorney's fees.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a hand-written, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Respondent is liable for, and shall pay, compensatory damages to Claimants in the amount of $26,924.88.

Claimants' claims for pre-judgment interest and punitive damages are denied.

All other claims not expressly granted are hereby denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = $250.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the event

giving rise to the dispute. In this matter, the member firm is Respondent Penson.

Member surcharge	= $2,500.00
Pre-hearing process fee	= $ 600.00
Hearing process fee	= $4,500.00

Adjournment Fees

Respondents filed an unopposed motion to adjourn proceedings scheduled to commence on Tuesday, January 19th, 1999. The panel granted the motion and waived payment of the adjournment fee.

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with a single arbitrator x $300.00 = $600.00

Pre-hearing conferences:

October 28, 1998	1 session
November 6, 1998	1 session

Three (3) Pre-hearing sessions with Panel x $1,000.00 = $3,000.00

Pre-hearing conferences:

September 24, 1998	1 session
March 16, 1999	1 session
November 8, 1999	1 session

Thirteen (13) Hearing sessions x $1,000.00 = $13,000.00

Hearing Dates:

August 3, 1999	2 sessions
August 4, 1999	2 sessions
August 5, 1999	2 sessions
August 6, 1999	2 sessions
October 4, 1999	1 session
February 23, 2000	2 sessions
February 24, 2000	2 sessions

Total Forum Fees = $16,600.00

The Panel has assessed $8,300.00 of the forum fees to Claimants, jointly and severally.

The Panel has assessed $8,300.00 of the forum fees to Respondent.

Fee Summary

Claimants, jointly and severally, be and hereby are liable for:

Initial Filing Fee	= $ 250.00
Forum Fees	= $8,300.00
Total Fees	= $8,550.00
Less Payments	= $1,250.00
Balance Due NASD Regulation, Inc.	= $7,300.00

Respondent be and hereby is solely liable for:

Member Fees	= $ 7,600.00
Forum Fees	= $ 8,300.00
Total Fees	= $15,900.00
Less payments	= $ 7,600.00
Balance Due NASD Regulation, Inc.	= $ 8,300.00

All balances are due and payable to NASD Regulation, Inc.

Concurring Arbitrators' Signature

/S/
Howard J. Adler, Esq.
Public Arbitrator, Presiding Chair

March 4, 2000
Signature Date

/S/
Stephen P. Savitt
Industry Arbitrator

March 6, 2000
Signature Date

/S/
Richard Lee Ashton, CPA
Public Arbitrator

March 6, 2000
Signature Date

March 14, 2000
Date of Service (For NASD office use only)

CONTRACTS

by

Carmela Pellegrino, J.D.

Scope of topic:

This article discusses the general principles governing the law of contracts, including certain basic definitions.

§ 144. Construction against party drafting contract

Doubtful or ambiguous language in a contract must be interpreted most strongly against the party who drew the contract,[83] or chose the language used,[84] especially where the draftsman seeks to use such language to defeat the contract or its operation[85]. In particular, ambiguous language will be construed against the party responsible for the drafting of the contract.

§ 163. General and special provisions mentioning one of a class

Generally, where there are general and special provisions in a contract relating to the same thing, the special provisions will govern in its construction over matters stated in general terms.[86]

§ 164. Conflict between printed and written or typewritten matter

When a contract is partly printed and party typewritten or written, the typewriting or writing controls over any inconsistent printed parts.

[Footnotes Omitted]

GENERAL ACCOUNT TERMS AND CONDITIONS

In consideration of your opening one or more accounts on behalf of the undersigned, the undersigned agrees as follows:

1. *Applicable Rules and Regulations.* All transactions shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market and its clearing house, if any, upon which such transactions are executed, except as otherwise specifically provided in this Agreement.

2. *Definitions.* **"EFGI" means Empire Financial Group, Inc.,** or any other brokerage firm which introduces securities transactions on behalf of the undersigned, which transactions are cleared through you, whether one or more. "Obligations" means all indebtedness, debit balances, liabilities or other obligations of any kind of the undersigned to you, whether now existing or hereafter arising. "Securities and other property" shall include but shall not be limited to, money, securities, commodities or other property of every kind and nature and all contracts and options relating thereto, whether for present or future delivery. **"You" or "your" refers to Penson Financial Services,** a division of Service Asset Management Company. **"The undersigned" refers to the customer** or customers in whose name the account is carried, or who have signed this Agreement.

* * *

(Emphasis added.)

OPTION ACCOUNT TERMS

In connection with any transactions in options which have been or may be purchased, sold, exercised or endorsed for the undersigned's accounts with Penson Financial Services, Inc., or EFGL, the undersigned agrees as follows:

1. *Limits.* The undersigned shall not, acting alone or in concert with others, exceed the position/exercise limits set forth by any exchange or market or by any other regulatory authority having jurisdiction.

2. *Authority, Execution of Orders, Security Interest.* The undersigned hereby authorizes **you** in **your** discretion, should **you** deem it necessary for **your** protection for any reason, or if the undersigned dies, to buy, sell or sell short for the undersigned's account and risk, puts, calls or other forms of option and/or to buy, sell or sell short any part or all of the underlying shares represented by options endorsed by **you** for the undersigned's account. Any and all expenses incurred by **you** in connection with such transactions shall be reimbursed by the undersigned to **you**. The undersigned understands and acknowledges that when transactions on the undersigned's behalf are to be executed and the options are traded in more than one marketplace **you** may use **your** discretion in selecting the market in which to enter the undersigned's order unless the undersigned specifically instructs otherwise. All monies, securities, or other property which **you** may hold in any account of the undersigned shall be held subject to a general lien for the discharge of

the undersigned's obligations to **you** under this Agreement or otherwise. (Emphasis added.)

3. *Notice Exercise Random Allocation.* The undersigned is aware of your requirements and time limitations for accepting an exercise notice and expiration date. The undersigned understands that the undersigned may not receive actual notice of exercise or assignment until the week following exercise. The undersigned bears full responsibility for taking action to exercise or sell valuable options; however, in the absence of the undersigned notifying EFGI to exercise a valuable options contract by 3 p.m. Central Standard/Daylight Time on the last business day prior to the expiration date of the options contract, and EFGI instructing you to sell valuable options on the undersigned's behalf within such time, the undersigned agrees that you may exercise the options contract on the undersigned's behalf. In the event of such exercise, the profit in excess of commission costs created thereby will be credited to the undersigned's account. In the event that the commissions to be charged for such an exercise transaction exceeds the proceeds to be realized, the undersigned agrees and hereby relinquishes the undersigned's ownership in said option to you, and you may exercise such option for your own account. If the undersigned does not instruct EFGI to exercise the valuable option by the time stated above, and you for whatever reason, do not exercise such option on the undersigned's behalf, the undersigned hereby waives any and all claims for damage or loss which the undersigned might at the time or any time thereafter have against you arising out of the fact that the option was not exercised. The undersigned is aware that you

utilize a random method of allocation for all option(s) assignments received from the Option Clearing Corporation. Exercise assignment notices for options contracts are allocated among all customers' short positions within that series. This is accomplished by a manual procedure which randomly selects from among all customer short positions, including positions established on the day of assignment, those contracts which are subject to exercise. All short positions are liable for assignment at any time. The undersigned understands that a more detailed description of this procedure is available upon request by the undersigned.

4. *Uncovered Options.* The undersigned agrees that in connection with any uncovered option(s) for the undersigned's account, the undersigned will not sell, during the life of such options, the underlying securities collateralizing such options, including any cash or securities which may accrue on the underlying covered securities until such options are closed, exercised or expired or the undersigned has met the collateral requirements established by you and/or EFGI for carrying uncovered options. The undersigned also agrees that EFGI and/or you in your respective sole discretion, may refuse any order to sell such underlying securities received from the undersigned or by means of a "giving up" basis through another firm unless, prior to such sale, the undersigned has met the collateral requirements established by you and/or EFGI for carrying uncovered options. You have the right, in your sole discretion, to permit the undersigned to apply the proceeds of such sale to such collateral requirements.

5. *Risks.* The undersigned is aware of the high degree of risk involved in options transactions and has given EFGI, in strict confidence, information to demonstrate that this account and the trading anticipated in connection therewith is not unsuitable for the undersigned in light of the undersigned's investment objections, financial situation and needs, experience and knowledge. The undersigned agrees to advise EFGI of any changes in the undersigned's investment objectives, financial situation or other circumstances that may be deemed to materially affect the suitability of executing options transactions for the undersigned's account.

6. *Options Account Form, Disclosure Documents.* The undersigned has reviewed the contents of the options account form and represents that they are accurate. Although certain types of transactions are indicated as anticipated you and EFGI may execute any other types of transactions for the undersigned's account upon the undersigned's instructions. The undersigned has received an Options Disclosure Document relating to options on the categories of underlying securities which the undersigned has been approved for trading.

* * *

OPTION ACCOUNT AGREEMENT

Due to the risk inherent in options, regulators require us to ask the following questions. This information will be treated confidentially. In addition, please complete the Financial Questionnaire on page 1.

What are your investment objectives?

(You may check one or more.)

[ ] Growth [X] Speculation

[ ] Income [ ] Conservation of Capital

[ ] Other _____

What type of activity do you plan to conduct in your Option Account?

(Check one or more.)

[X] Write Covered Options
[X] Purchase Options
[X] Create Spreads
[X] Write Uncovered Options ($50,000 minimum equity required in account.)

I represent that I am aware of the inherent risks of option trading and that I am financially able to bear such risks and withstand option trading losses. I hereby apply for an Option Account. I have read the Terms & Conditions that will govern my account and agree to be bound by them as currently in effect and as amended from time to time.

DATE	SIGNATURE	SIGNATURE
11-13-96	Dominic F. Gangale	Dale M. Gangale

* * *

Supreme Court, U.S.
FILED
OCT 5 2001
CLERK

No. 01-409

IN THE

Supreme Court of the United States

DOMINIC F. GANGALE,
DALE M. GANGALE,

Petitioners,

v.

PENSON FINANCIAL SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

Thomas W. Craddock
MCGUIRE, CRADDOCK & STROTHER, P.C.
500 N. Akard – Suite 3550
Dallas, Texas 75201
Telephone: 214-954-6800
Facsimile: 214-954-6868

Counsel for Respondent
Penson Financial Services, Inc.

QUESTIONS PRESENTED

Petitioners present six questions, none of which are appropriate for consideration, as they do not satisfy the standards for Supreme Court review.

The Eleventh Circuit's decision is subject to factual review only if "clear error" is evident, yet Petitioners allege no such factual error. Although the Eleventh Circuit's decision is subject to review on a *de novo* basis concerning the proper legal standards of the Federal Arbitration Act, Petitioners do not point to any errors of law, except to the extent they boldly assert that the Eleventh Circuit's decision is "in direct conflict with the . . . cornerstone decision of Gallagher v. Jones . . . (sic)" However, there is no discussion of this alleged conflict because it is non-existent.

The Eleventh Circuit clearly addressed the proper legal question: did Petitioners prove a "manifest disregard for the law" by the arbitration panel when it applied the measure of damages adopted by the Supreme Court in *Galigher v. Jones*, 129 U.S. 193 (1889) and by the courts of Texas in directly comparable circumstances? Petitioners did not and can not prove such a "manifest disregard."

The only possible question properly reviewable now is "Did the Eleventh Circuit correctly apply the appropriate standard of review pursuant to the Federal Arbitration Act?" Any other factual or legal analysis in the Petition is extraneous and insignificant to this appeal.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Penson Financial Services, Inc. ("Penson") was, at the time of the Arbitration Award, a division of Service Asset Management Company, Inc., but is now a subsidiary of Penson Worldwide, Inc. There is no publicly held company that owns ten percent (10%) or more of Penson's stock.

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STATEMENT OF THE CASE

Petitioners Dominic F. and Dale M. Gangale ("Petitioners" or "the Gangales") continue their appeal of a unanimous arbitration award in their favor ordering Respondent Penson Financial Services, Inc. ("Penson") to pay the Gangales $26,924.88 (the "Award"). The Award was made by a duly appointed panel of three arbitrators from the Office of Dispute Resolution of NASD Regulation, Inc. in Case No. 98-0133 after six days of hearings. Penson tendered full payment of the Award within the time prescribed by applicable NASD rules.[1] The Gangales challenged the Award in the United States District Court for the Middle District of Florida. Judge James S. Moody confirmed the Award, expressly refusing to modify or vacate it. The Gangales appealed that decision to the United States Court of Appeals for the Eleventh Circuit, which found no reversible error and affirmed the District Court decision. In their Petition for Writ of Certiorari, the Gangales assert for the first time ever that this case involves Rule 405 of the New York Stock Exchange, Rule 2110 of the NASD Manual (sic: NASD Conduct Rule 2110), Rule 240.10b-5 of the Securities & Exchange

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[1] During the pendency of their appeal to the Eleventh Circuit, the Gangales negotiated the check they received from Penson in payment of the full amount of the Arbitration Award. Thus, their appeal is mooted by the "acceptance of benefits" doctrine. See *Fidelcor Mortgage v. Insurance Co. of North America*, 820 F.2d 367 (11th Cir. 1987). Although Penson filed a Motion to Dismiss in the Eleventh Circuit on this point, the motion was denied as moot in light of the court's affirmance of the district court decision.

Commission, the Securities & Exchange Act of 1934 [15 U.S.C. §20(a)] and Rule 2310-2 of the NASD Manual (sic: NASD Conduct Rule 2310-2). None of these statutes or rules have been brought to the attention of, nor were they expressly considered by, the arbitration panel or the courts below.

The facts before the arbitration panel were relatively straightforward. In 1996, the Gangales opened a securities brokerage account with Penson, as clearing broker, through Empire Financial Group, Inc. ("Empire"), their introducing broker.[2] Mr. Gangale proceeded to engage in highly speculative and extremely risky trading in options on margin in that account and the account value fluctuated significantly from month to month. At the end of December, 1997, when the account had a negative value of almost $400,000, Empire notified Mr. Gangale of significant margin calls for the account and the necessity for liquidating the positions in the account unless additional collateral was placed in the account. After some negotiation, Mr. Gangale and Penson entered into a Memorandum of Agreement pursuant to which Mr. Gangale made a collateral assignment of two notes with a face value totaling $1,000,000 (the "Collateral Notes")[3] and Penson agreed that

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[2] The Gangales chose not to name Empire as a party to the arbitration.

[3] The actual value of the Collateral Notes has never been determined, as Penson was unable to obtain any financial data concerning the maker.

> Providing the absence of further account deterioration as it relates to account balances as of December 29, 1997, Penson will allow Gangale to "roll forward" any option position and generally allow Gangale to trade on the account, with the intent to betterment the capitalization of said account, providing no additional risk is created.

In February, 1998, Empire (which did not sign the Memorandum of Agreement) requested that Petitioners provide additional margin to support the continuation of their highly speculative trading. When Petitioners failed to meet that margin call, Empire ordered the liquidation of the positions in the Gangales' account.[4] After liquidation, there was a negative net balance of over $13,000 in Petitioners' account (not counting the Collateral Notes, which Penson held until the negative balance was retired through collections from the maker of the Collateral Notes).

In April, 1998, the Gangales filed a Statement of Claim with the Arbitration Department of the National Association of Securities Dealers, alleging that they had suffered significant losses because Penson had liquidated their account

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[4] Empire was liable to Penson for all losses in every customer account, including the Gangales' account, and was, accordingly, also "at risk." Empire also had a contractual right under the Gangales' account agreement to terminate the account.

(rather than Empire)[5], even though, they claimed, the account had not deteriorated. Arbitrators were appointed through applicable NASD procedures.

At the arbitration, the Gangales submitted an expert's report calculating damages according to *Mercantile Holdings, Inc. v. Keeshin*, 633 N.E.2d 805 (Ill. 1st Dist. 1993), showing that, had the account not been liquidated and Mr. Gangale's trading strategy been followed, the Gangales' account could have increased in value by $1,232,437. On cross-examination of the Gangales' expert, he admitted to several errors and shortcomings in his calculations.

Penson contested liability, but also submitted expert testimony on the issue of damages, calculating damages according to *Galigher v. Jones*, 129 U.S. at 202. In a written report, Penson's expert showed that, if Penson were liable to the Gangales at all, the damage they suffered was only $26,924.88, the net difference between liquidation prices obtained on the sale of the Gangales' positions and the highest prices obtainable for those positions over the following five days. Although the arbitrators did not state the method they used for calculating damages, they awarded the Gangales $26,924.88, the exact amount of damages using the *Galigher* damage model.

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[5] Until the actual arbitration hearing, the Gangales erroneously believed that Penson, not Empire, had initiated the liquidation of this account.

REASONS FOR DENYING THE PETITION

There is simply no valid reason - - and certainly not any compelling reason, required by Rule 10 - - for the Court to exercise its discretionary authority to review the Eleventh Circuit decision.

In affirming the District Court's decision, the Eleventh Circuit correctly applied the applicable standard from 9 U.S.C. §10, as re-articulated in *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997). Specifically, Petitioners failed below, and have failed again here, to show that the Award should be vacated due to a manifest disregard of applicable law by the arbitration panel. The Circuit Court properly found "no merit" to Petitioners' claim that the calculation of damages represented a manifest disregard of applicable law.

Similarly, the Circuit Court properly found "no merit" to Petitioners' claim of "evident partiality" by the arbitration panel, correctly finding that Petitioners failed to establish a "reasonable impression of partiality" which is "direct, definite, and capable of demonstration rather than remote, uncertain and speculative...." *Lifecare Int'l, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995).

I.

PETITIONERS ERRONEOUSLY ATTEMPT TO DISTINGUISH WRONGFUL LIQUIDATION DAMAGES FROM BREACH OF CONTRACT DAMAGES AND ERRONEOUSLY CONTEND THAT THE ARBITRATORS' REFUSAL TO ACCEPT PETITIONERS' ALLEGED DISTINCTION AMOUNTS TO "MANIFEST DISREGARD OF APPLICABLE - LAW" AND "INTENTIONAL MISCONDUCT."

Petitioners mistakenly contend that this is not a wrongful liquidation case. The Memorandum of Agreement upon which Petitioners filed their arbitration action can only be described as a contract by which the Petitioners agreed to provide additional collateral to maintain their option positions in exchange for an agreement by Penson not to liquidate the account "providing the absence of further account deterioration" and "providing no additional risk is created." Petitioners contend Penson breached this contract when Empire (not Penson) liquidated Petitioners' account upon their failure to provide additional equity for the margin account. Since Petitioners' account was liquidated despite an agreement limiting Penson's liquidation rights, the only issue presented is whether that liquidation by Empire was a wrongful act of liquidation by Penson.

The method for calculating damages resulting from a wrongful liquidation is plainly stated by the Court in *Galigher*

v. Jones, and that method has been adopted and applied in similar cases by the courts of Texas (whose law governs the Petitioners' account). See *Reed v. White, Weld & Co., Inc.*, 571 S.W. 2d 395, 397 (Tex. Civ. App.-Texarkana 1978, no writ).[6] The Eleventh Circuit correctly noted that Petitioners "offer no reason to believe the arbitration panel's decision to apply the measure of damages adopted by the Supreme Court and the courts of Texas for cases where a broker violates a contract by liquidating securities positions was anything more than a misinterpretation or misapplication of the law (if it was even that). Accordingly, they have not shown a 'manifest disregard for the law' by the arbitration panel." Citation to *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1462 (11th Cir. 1997).

Moreover, Petitioners are asking this Court to apply a measure of damages that is highly speculative and fraught with opportunities for flawed results. Rather than the simplicity used by the Texas court in *Reed v. White* ("the true

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[6] Petitioners claim *Galigher* is not appropriate precedent because it is "a wrongful liquidation case, not a Contract case." [Petition at p. 12] Petitioners mistakenly quote from a lower court opinion reviewed in *Galigher*, which read "I do not...find any contract or understanding...." However, Petitioners fail to recognize that the Supreme Court disagreed and found: "In this we think the court was in error." *Galigher* at 198. *Galigher* addresses "the measure of damages in stock transactions of this kind...." *Galigher* at 200. The stock transactions under review in *Galigher* involved a broker's assumption of control over his principal's stock and the sale of that stock at an unfavorable time for an unfavorable price. Because stocks fluctuate in price, the Court found need for a specific rule for the calculation of damages in such circumstances and clearly provided one. *Galigher* at 202.

and just measure of damages is the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock." Id.) Petitioners' damage model was based on rank speculation, specifically reciting that the calculations included "a security-by-security position analysis employing trading strategies consistent with Mr. Gangale's past trading history and his trading instructions."[7] This kind of retrospective analysis with the benefit of hindsight was rejected in *Reed*. That approach was also rejected in *Lichter v. Paine Webber, Jackson, Curtis, Inc.*, 573 F. Supp. 533 (N.D. Illinois, 1983), where a customer challenged Paine Webber's liquidation of bonds. The court wrote:

> "Thus Lichter's only demonstrable harm lay in the fact of liquidation of the IH bonds by Paine Webber. The event triggered his damages, if any, and that event defines when any damages were sustained. Because full market price was realized for the bonds, Lichter must look elsewhere for any damages. And on that 'elsewhere' score, it is not as though Paine Webber had converted an irreplaceable Van Gogh. Replacement IH bonds were readily available on the market if Lichter wanted them and had the price. If he did not have the price

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[7] Rather than determine a specific date as a "reasonable period" for the determination of damages, Petitioners' expert selected hypothetical and varied trade dates, months after the liquidation, to maximize Petitioners' claim for damages.

> he cannot complain, for by definition he would have been unable to meet his cash margin obligation and could have been sold out by Paine Webber as a matter of right."

Id. at 536. Here, Petitioners wildly contend that their contract with Penson contained "concessions [presumably by Penson] that would otherwise not be granted to anyone." Petitioners then stretch their argument to an untenable conclusion: "Thus, the Gangale contract took the form of a Van Gogh that could not be duplicated anywhere." [Petition at p. 13, footnote 4] This convoluted analysis ignores the absolute and unquestionable reality that the liquidated securities could have been replaced within two minutes, but Petitioners either were not able to do so or elected not to do so. Whatever their reason for not re-entering the market, Petitioners have no proper complaint against Penson.

Following century-old Supreme Court precedent is not a "manifest disregard for the law."

II.

PETITIONERS FAILED TO SATISFY THEIR BURDEN UNDER THE FEDERAL ARBITRATION ACT

When, as here, a district court has confirmed an arbitration award, the Eleventh Circuit could only review the district court's findings for "clear error", and its holdings of law on a "de novo" basis. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995); *Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1310 (11th Cir., 1998). Based on these unmistakable precedents, the Eleventh Circuit had to be mindful that arbitrators must be given considerable leeway in their decision-making and that vacation of an arbitration award is to be permitted only in extremely limited circumstances. Indeed, the standard is of particular significance in this case, since Petitioners seek to overturn or modify an Award in an arbitration in which they sought - - and obtained - - damages.

The applicable legal standard for modifying an arbitration award is found at Section 11 of the Federal Arbitration Act:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon application of any party to the arbitration –

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. ...
>
> 9 U.S.C. § 11

Similarly, the applicable legal standard for vacating an arbitration award is found at Section 10 of the Federal Arbitration Act:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
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> * * *
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> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
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> (c) Where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other

> misbehavior by which the rights of any party have been prejudiced....
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> 9 U.S.C. §10

Petitioners have wholly failed to satisfy either standard.

Petitioners' only argument which even comes close is a feeble claim of partiality, but it falls well short of the requirements of *Lifecare Int'l, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995)

Rather than show how these statutory requirements are met, Petitioners unnecessarily burden the record with misstatements, inappropriate references and claims for which there was no support before the arbitration panel. References to tape recordings that Petitioners claim would be damaging to Penson are based on nothing more than conjecture.[8] Moreover, references to arbitration decisions concerning collective bargaining agreements are irrelevant to this dispute. References to "control person" tests under the securities laws similarly have no application to this case.

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[8] For example, the bold assertion that a Penson employee stated "if you want the note back, I [sic: you] can have the note back" is plainly wrong and is quoted out of context. [Petition at p. 7] The taped conversation between Empire's principal and Mr. Gangale occurred before the final liquidation of Petitioners' account for failure to satisfy a maintenance call, and not after, as Petitioners appear to suggest.

Before an arbitration award will be vacated, the party challenging the award must establish a "reasonable impression of partiality" which is "direct, definite and capable of demonstration rather than remote, uncertain and speculative[;]...the mere appearance of bias or partiality is not enough to set aside an arbitration award." Id.

Petitioners also complain that they made an involuntary withdrawal of a "memorandum of law" which Mr. Gangale had written, and which, they contend, had been accepted for consideration by the panel. While the parties worked on a schedule for Penson to respond to this "memorandum of law," the panel chair commented that he had never seen a "memorandum of law" submitted by a client. He added: "Having said this and I have said it before, I wanted you to know what I consider an unusual procedure will not influence me one way, in any way in rendering a decision." He then asked Petitioners' counsel "Do you feel the same way?" And the lawyer answered, "Yes" and asked for two minutes to confer with his client. Immediately following that conference, the memorandum was withdrawn, thereby obviating the need for a responsive memorandum from Penson.

Petitioners' counsel, knowing that the "memorandum of law" had been withdrawn, told the panel: "On behalf of the Claimants, we have had a full and fair opportunity to be heard." Penson's counsel agreed. Thereafter, Penson's counsel handed the chairman of the arbitration panel a copy of the Texas case adopting the *Galigher* standard, having previously argued in his closing that failure to follow the

Galigher precedent would be a manifest disregard of the applicable law.

This Court must simply disregard Petitioners' argument for what it plainly is: a futile attempt to claim partiality by the arbitration panel because the arbitrators chose to follow the applicable law. It can not serve as a basis for vacating an arbitration award.

CONCLUSION

For the foregoing reasons, Penson respectfully requests that this Court deny the Petition of Writ of Certiorari. The Eleventh Circuit's decision is a proper application of a longstanding principle of law, and this case raises no significant legal issues that warrant review.

Respectfully submitted, this 5th day of October, 2001.

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